95-902

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SOMERSET COUNTY, MARYLAND,
Petitioner,

v.

GEORGE JOSEPH ARAVANIS,
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the civil *in rem* forfeiture of respondent's home, where respondent was its sole owner and used it for a substantial period of time to facilitate the distribution of marijuana, is permissible under the Excessive Fines Clause of the Eighth Amendment.

PARTIES TO THE PROCEEDING

The petitioner is Somerset County, Maryland, acting on behalf of the Somerset County Narcotics Task Force. The respondent is George Joseph Aravanis, in his capacity as owner of the property listed in the caption to the final judgment of forfeiture, App. 30a, *infra*.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Somerset County, Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Aravanis v. Somerset County*, 339 Md. 644, 664 A.2d 888 (1995), vacating the forfeiture of respondent's real property, is reproduced in Appendix A. (App. 1a-29a). The unreported opinion and order of the Circuit Court for Somerset County is reproduced in Appendix B. (App. 30a-39a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland vacating the forfeiture of respondent's property was filed on September 13, 1995. This petition is filed within ninety days of that judgment, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Maryland drug forfeiture law in effect at the time of this case, MD. ANN. CODE art. 27, § 297 (1992), is reproduced in Appendix C. (App. 40a-59a).

STATEMENT OF THE CASE

On April 17, 1991, George Joseph Aravanis acquired sole title and possession to the property consisting of 4.08 acres of land located on the easterly side of Shelltown Road in Somerset County, Maryland. (App. 31a). That same day, by his own admission, Aravanis began selling marijuana out of the house located on the property. (App. 8a).[1]

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[1] In fact, Aravanis had been selling drugs out of his home even before 1991, during the time that he and his wife owned the property as tenants by the entireties. (App. 2a). An uncontroverted search warrant affidavit introduced at the forfeiture trial showed that various informants and citizens

(continued...)

Two and one-half months later, Aravanis's drug dealing came to an abrupt end. On July 2, 1991, members of a narcotics task force executed a search and seizure warrant at Aravanis's home. (App. 2a-3a). Over two pounds of marijuana were seized from a gas barbecue grill located just outside his house. (App. 3a). Inside the home, officers seized drug paraphernalia items, including baggies found in a bedroom bureau drawer, and a set of triple beam scales. (App. 3a-4a). The officers also seized 42 marijuana plants that were discovered 150 to 200 yards north of the residence. (App. 4a).[2]

Following the execution of the warrant, Aravanis evaded arrest for four months. He was arrested in

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[1](...continued)
alleged that Aravanis was involved in trafficking large quantities of marijuana and other drugs from the property over the preceding three years; various family members stated that Aravanis had been distributing drugs for many years; the affiant was given a large quantity of marijuana from one of the family members, who stated that it came from Aravanis's home; two other individuals stated that they had purchased large quantities of marijuana on three or four occasions from Aravanis; a confidential informant stated that she had purchased marijuana from Aravanis on many occasions; and at least 15 vehicles were observed by the affiant going to Aravanis's property, only to stay for a short time and leave. (App. 3a).

[2] As noted by the Court of Appeals of Maryland, the trial court did not consider these plants as evidence supporting forfeiture, apparently because the plants were not located on Aravanis's property. (App. 4a). At the forfeiture trial, an officer testified that he seized the plants because he was told by Aravanis's daughter that the plants belonged to Aravanis.

October, 1991, and entered a guilty plea to a charge of possession of a controlled dangerous substance in sufficient quantity to indicate an intent to distribute on January 23, 1992. (App. 31a). He was sentenced to five years imprisonment, with all but 18 months suspended. (App. 31a).

On January 24, 1992, the Somerset County Narcotics Task Force, acting through the State's Attorney for Somerset County (hereinafter "the State"), instituted proceedings under Maryland's drug forfeiture statute, MD. ANN. CODE art. 27, § 297 (1992).[3] (App. 30a). The State established that the real property sought to be forfeited was owned solely by Aravanis, offering a deed and plat to the property. Also admitted into evidence was a copy of the search warrant executed at Aravanis's property, together with its application and affidavit, and return. The final piece of tangible evidence admitted was a copy of the docket entries evidencing Aravanis's criminal conviction for the drug offense underlying the forfeiture action.

The two witnesses called on behalf of the State were officers with the narcotics task force who had been present when the search warrant was executed at Aravanis's home on July 2, 1991. Their testimony established that drugs and paraphernalia were found inside and just outside Aravanis's house on that day.

In his defense, Aravanis called his two adult sons as witnesses. Both men testified that they were residing with their father at the time of the warrant's execution, but had moved by the time the forfeiture proceedings

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[3] The full text of this law appears in Appendix C, *infra*. (App. 40a-59a). As the Court of Appeals of Maryland explained, the law is quite similar to the federal forfeiture statute, 21 U.S.C. § 881, that was at issue in *Austin v. United States*, 113 S. Ct. 2801 (1993). (App. 12a-14a).

were instituted. Aravanis also testified.

Aravanis admitted that he was a drug dealer and challenged only the State's suggestion of the extent of his dealing. He testified that he started to sell drugs on April 17, 1991, when he became sole owner of the property. He added, however, that the property was paid for legally, and that it would be unfair to take his home merely because he used it to sell marijuana for two and a half months. On this score, Aravanis testified:

> The drug business has been here before I started it, and it's going to be here after, Your Honor, and for this state or this country to take a man's home that he's, for a few months of illegal activity, is not right.

The trial court rejected Aravanis's self-styled Eighth Amendment argument. The court determined that Aravanis's property had been used to facilitate the sale of marijuana. (App. 38a). In particular, the court pointed to evidence that more than two and a half pounds of marijuana had been found and seized near the back steps of Aravanis's house. (App. 34a). The court also referred to evidence that the State had made two controlled purchases of marijuana from Aravanis's property shortly before the execution of the search warrant. (App. 34a).

The trial court rejected as well Aravanis's contention that "the penalty (forfeiture of his real property) is far beyond the crime." (App. 34a). The court agreed that forfeiture of real property is a "harsh measure," but noted that the Maryland legislature intended to provide "local law enforcement authorities with a forfeiture law as another enforcement tool in their arsenal against the spread of controlled dangerous substances." (App. 37a).

The court concluded: "There is no question that the real property at Shelltown Road was used in connection

with the distributing and dispensing of marijuana." (App. 38a). Accordingly, the court ordered, on August 24, 1993, that Aravanis's property be forfeited to the Somerset County Narcotics Task Force. (App. 39a).

Aravanis appealed to the Court of Special Appeals of Maryland, but before that court heard the matter, the Court of Appeals of Maryland granted certiorari on its own motion. (App. 8a). The Maryland high court considered whether the state's drug forfeiture statute was subject to the Eighth Amendment's Excessive Fines Clause and/or its identically worded counterpart in Article 25 of the Maryland Declaration of Rights.[4] (App. 1a-2a). Holding that civil *in rem* forfeitures are subject to an excessive fines analysis, the Court of Appeals reversed the trial court's judgment. (App. 2a).

Although the Court of Appeals purported to base its ruling on Article 25 of the state declaration of rights, and not the Eighth Amendment, (App. 14a), the court made plain that federal law controlled the outcome of the case, (App. 16a). The court stated that the two provisions were *in pari materia*, that the excessive fines provision of Article 25 served as a model for the Excessive Fines Clause of the Eighth Amendment, and "[t]hus, the excessive fines provision of Article 25 should be interpreted co-extensively with the excessive fines provision of the Eighth Amendment." (App. 16a).

The court discussed the *Austin*[5] decision and lower court cases that have formulated tests by which to assess

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[4] Article 25 of the Maryland Declaration of Rights provides: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law." Md. Decl. of Rts., Art. 25.

[5] *Austin v. United States*, 113 S. Ct. 2801 (1993).

whether a forfeiture is excessive under the Eighth Amendment, noting that "[t]he results have not been uniform." (App. 18a). After a lengthy comparison of the instrumentality test and various forms of a proportionality test, (App. 18a-26a), the Maryland high court concluded: "The requirements of the Excessive Fines Clause of the Eighth Amendment and, hence, of Article 25 of the Maryland Declaration of Rights, mandate that recognition and effect be given to the use of the word 'excessive' in that clause and to the *Austin* court's holding that a civil forfeiture is punishment." (App. 26a).[6] The court thereupon rejected the

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[6] Because the decision below was based upon an interpretation of federal law, it does not rest on an adequate and independent state ground. *See Arizona v. Evans*, 115 S. Ct. 1185, 1190 (1995). Not only did the court not state that its references to federal law were "being used only for the purpose of guidance," *id.* at 1190-91, *quoting Michigan v. Long*, 463 U.S. 1032, 1041 (1983), it affirmatively stated the opposite, i.e., that its references to federal law were binding. For this reason, the state court's ruling depended on a federal constitutional ruling and consequently does not present an independent state ground for the decision rendered. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). Thus, even if the judgment ultimately rested on state law, the Maryland court obviously "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, [this Court has] jurisdiction and should decide the federal issue." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). *See also ASARCO v. Kadish*, 490 U.S. 605, 625 (1989) (opinion not based on adequate and independent state ground where state supreme court "was free to rest its holding on the State Constitution as an independent ground, [but] the decision below did not

(continued...)

instrumentality test in favor of a proportionality test and remanded the case for further proceedings. (App. 26a-28a).

REASONS FOR GRANTING THE WRIT

This case presents an important question raised in, but unanswered by, this Court's decision of *Austin v. United States*, 113 S. Ct. 2801 (1993). In *Austin*, this Court held that civil *in rem* forfeitures of property are subject to review as punishment under the Eighth Amendment's Excessive Fines Clause. *Id.* at 2812. *See also Libretti v. United States*, 116 S. Ct. 356, 363 (1995) (reaffirming that forfeitures of property are punitive in nature). The Court, however, expressly declined Austin's invitation "to establish a multifactor test for determining whether a forfeiture is constitutionally 'excessive,'" leaving it to the lower courts "to consider that question in the first instance." 113 S. Ct. at 2812. In the more than two years since *Austin*, the lower courts—federal and state alike—have struggled to formulate a workable standard under which to determine when a forfeiture is excessive. The struggle has generated considerable confusion and has led to a conflict in the lower courts.

As the opinion in this case recounts, the conflict is substantial. Recognizing the diversity among the approaches to the precise question of how to assess the excessiveness of forfeitures of facilitating property, (App. 18a-21a), the Court of Appeals of Maryland rejected the so-called "instrumentality" test, which

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[6](...continued)
divorce the state constitutional issue from the questions of federal law").

focuses upon the "guilt" of the property, in favor of a multi-factor "proportionality" analysis. (App. 26a-28a). The latter analysis considers, among other things, not only the property's connection to the crime, but the value of the property and the effect of its loss on the owner and others who might be connected to the property. With this case, this Court can articulate the appropriate standard, resolve the existing conflict, and provide clear guidance to the lower courts in analyzing this frequently recurring issue.

1. This Court's opinion in *Austin* leaves open a number of questions. *Austin* does not address, for example, whether the Excessive Fines Clause requires a proportionality analysis similar to that used in determining whether a sentence passes muster under the Cruel and Unusual Punishment Clause of the Eighth Amendment.[7] If, on the one hand, such a proportionality analysis is appropriate, it remains unclear whether the analysis is required in all cases, or in only those cases where, on its face, the forfeiture appears "grossly disproportionate." See *Harmelin v. Michigan*, 501 U.S. 957 (1991), where two Justices flatly rejected proportionality as part of the Eighth Amendment, *id.* at 964-66 (Scalia, J., joined by Rehnquist, C.J., Parts I, II, and III of Court's opinion), and three other Justices would limit the scope of *Solem*

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[7] In *Solem v. Helm*, 463 U.S. 277, 292 (1983), this Court held that the applicable proportionality analysis for determining whether a sentence constitutes cruel and unusual punishment under the Eighth Amendment includes consideration of: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentence imposed for commission of the same crime in other jurisdictions.

v. Helm to review of "only extreme sentences that are 'grossly disproportionate' to the crime," *id.* at 1001 (Kennedy, J., joined by O'Connor & Souter, JJ.).

If, on the other hand, application of *Solem* is unworkable in the context of an excessive fines analysis, the question remains whether a proportionality test best accommodates the protections afforded by the Excessive Fines Clause, and, if so, what that test entails. It is as yet unclear whether proportionality should be tied to the "guilt" of the property alone or, instead, to the property's guilt in combination with other factors such as the value and nature of the property itself, the harm caused by the underlying criminal conduct, and the status of the property owner and others connected to the property.[8]

Not only does *Austin* leave unanswered a number of questions, it contains mixed signals with respect to possible answers. Justice Scalia suggested in his separate opinion in *Austin* that the single question is "not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense." 113 S. Ct. at 2815 (Scalia, J.,

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[8] It is also unclear whether, in assessing excessiveness of a forfeiture under the Eighth Amendment, the analysis should be informed by the considerable deference that is given to legislative judgments in the area of sentencing. *See Harmelin v. Michigan*, 501 U.S. 957, 998 (1991); *see also United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 515 (1993) (Thomas, J., concurring in part and dissenting in part) ("[g]iven that current practice under § 881(a)(7) appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture").

concurring in part and dissenting in part). In its majority opinion, the Court noted Justice Scalia's suggestion "that the sole measure of an *in rem* forfeiture's excessiveness is the relationship between the forfeited property and the offense," and did "not rule out the possibility that the connection between the property and the offense may be relevant." *Id.* at 2812 n.15. The Court, however, did not limit the courts of appeal from considering other factors to determine whether the forfeiture of the property was excessive. *Id.*

2. In light of all of this, confusion among the lower courts abounds. Some courts have concluded that the proper measure of excessiveness begins and ends with the question whether the subject property is substantially connected to the criminal activity. The leading proponent of this type of analysis—the so-called instrumentality test—is the Court of Appeals for the Fourth Circuit. *United States v. Chandler*, 36 F.3d 358, 360 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995). This test is grounded on the rationale that, because the property itself is considered the offender, its value is irrelevant: "The question of excessiveness is ... tied to the 'guilt of the property' or the extent to which the property was involved in the offense, and not its value." *Id.* at 364. The analysis "centers on the *relationship* between the property and the offense—the more incidental or fortuitous the involvement of the property in the offense, the stronger the argument that its forfeiture is excessive." *Id.* The owner's involvement in the crime bears on whether the "fine" is excessive, since forfeiture of property effects punishment on its owner: "where the owner's involvement in the offense is only incidental, as opposed to extensive—*e.g.*, where he is simply aware of the offense but not a perpetrator or conspirator—this fact

will weigh on the excessiveness side of the scales." *Id.* Finally, the instrumentality test takes into account "the pragmatic possibility of separating offensive property from nonimplicated property, when the offending property is readily separable." *Id.*

The Seventh Circuit Court of Appeals also appears to find the instrumentality test appropriate in the excessive fines analysis. In *United States v. Plescia*, 48 F.3d 1452, 1462 (7th Cir.), *cert. denied*, 116 S. Ct. 114 (1995), that court, in a cursory review of the excessive fines issue, referred to Justice Scalia's view that the pertinent question is whether the confiscated property has a close relationship to the offense. *Id.* And in the Sixth Circuit, at least one judge believes that the instrumentality test is the proper test to determine if a civil forfeiture is constitutionally excessive. *United States v. 429 South Main Street*, 52 F.3d 1416, 1423-24 (6th Cir. 1995) (Guy, J., dissenting) (agreeing with majority that "this is not the case in which we should attempt to adopt a test for this circuit," but commenting that forfeiture in this case would fail by application of instrumentality test). The instrumentality test, in one form or another, has been adopted by several lower federal and state courts. *United States v. 9844 South Titan Court,* 865 F. Supp. 709, 715 (D. Colo. 1994); *United States v. 2828 North 54th Street*, 829 F. Supp. 1071, 1073 (E.D. Wis. 1993); *City of Worthington Police v. One 1988 Chevrolet Beretta*, 516 N.W.2d 581, 584 (Minn. 1994); *In re King Properties*, 535 Pa. 321, 330, 635 A.2d 128, 133 (1993).

Other federal circuit courts of appeal, like the Court of Appeals of Maryland, have eschewed sole reliance on the instrumentality test in favor of a test that includes a proportionality analysis. The Ninth Circuit's decision in *United States v. 6380 Little Canyon Road*, 59 F.3d 974 (9th Cir. 1995), typifies this proportionality approach.

Under this test, the government has the initial burden of establishing a "substantial connection" between the property and the offense; the burden then shifts to the claimant to establish that forfeiture of his property would be "grossly disproportionate" given the nature and extent of his criminal culpability. *Id.* at 985. Factors that the Ninth Circuit has identified as relevant include: (1) the harshness of the forfeiture, including its fair market value *and* its "subjective" value to its owner (e.g., the family home), and the harm to the defendant and his family members resulting from deprivation of that property; (2) the owner's culpability, i.e., whether, and if so, the extent to which the owner was directly involved in the illegality; and (3) the extent of the harm caused by the crime itself (including, in the case of drug-related offenses, the amount and type of drugs involved, the duration of the illegality and societal harm). *Id.* at 985-86.

Although those courts that adopt a proportionality analysis generally agree that factors in addition to those comprising the instrumentality test are relevant to the excessiveness inquiry, they disagree not only on what factors are relevant but on how much weight to accord each in the analysis. The Third Circuit Court of Appeals, for example, has declined to establish a test, but has suggested that factors to consider include the three-part test outlined in *Solem v. Helm*, 463 U.S. 277, 292 (1983). *United States v. RR #1, Box 224*, 14 F.3d 864, 874-75 (3d Cir. 1994). Pursuant to this test, the inquiry into whether the forfeiture is excessive would include consideration of the gravity of the offense, the harshness of the penalty, and other sentences (fines) imposed. *Id.* at 874-76. At least one other court looks to the *Solem* test as guiding the analysis. *Hill v. State of Tennessee*, 868 F. Supp. 221, 225 (M.D. Tenn.

1994) (adopting *Solem* test for excessiveness inquiry).[9]

The Second Circuit Court of Appeals, by contrast, takes into account in the excessiveness analysis the fine that could be imposed on the perpetrator of the offense. *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995). The Tenth Circuit has also suggested that the potential sanction is relevant to the analysis. *United States v. Libretti*, 38 F.3d 523, 531 (10th Cir. 1994) (holding that forfeiture not excessive and noting that value of property combined with fine imposed on criminal case amounted to much less than permissible fine), *aff'd on other grounds*, 116 S. Ct. 356 (1995). Taking a different tack, the Eighth Circuit Court of Appeals has suggested that, in addition to other factors, the proportionality test should take into account the effect of forfeiture on innocent occupants of the place forfeited, including, in the case of a residence, children.

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[9] A *Solem*-type proportionality test may well prove unworkable in the excessive fines context. In *Harmelin v. Michigan*, a majority of the Court favored either dispensing with the *Solem* test in all non-capital cases, 501 U.S. at 965 (Scalia, J., joined by Rehnquist, C.J.) (concluding that "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee") or reaching *Solem*'s inter- and intra-jurisdictional analyses only "in the rare case in which the threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," *id.* at 1005 (Kennedy, J., joined by O'Connor & Souter, JJ.). *See also United States v. Chandler*, 36 F.3d at 365 (rejecting *Solem* test in this context). *But see Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300-01 (1989) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part) (proposing that *Solem* factors be "adapted" to a challenge under the Excessive Fines Clause).

United States v. 9638 Chicago Heights, 27 F.3d 327, 330-31 (8th Cir. 1994).

While the controversy brews, some courts, including the Sixth and Eleventh Circuits, have attempted to evade the issue altogether. The Sixth Circuit to date has declined to fashion a test for determining excessiveness. *United States v. 429 South Main Street*, 52 F.3d at 1422 (noting that different tests are applied among the circuits, but concluding that the case before the court did not present the proper occasion for announcing that court's test). The Eleventh Circuit has simply concluded, without reliance on any stated standard and with little analysis, that a particular forfeiture was excessive under the Eighth Amendment. *United States v. 18755 North Bay Road*, 13 F.3d 1493, 1498-99 (11th Cir. 1994) (concluding that forfeiture of an elderly couple's $150,000 home was an imposition of a "disproportionate penalty" for the husband's conducting illegal poker games with relatives and associates in their home). *See also In Re One 1993 Dodge Intrepid*, 645 So. 2d 551, 552 (Fla. 1994) (merely stating that the trial court satisfactorily applied the multi-factor approach approved in *Austin* and considered some of the factors used by other courts in deciding the issue).

3. The above analyses are at odds with one another and the resultant confusion necessitates guidance from this Court. This case provides the vehicle for this Court to resolve the conflict among the lower courts. In resolving that conflict, the Court should adopt the instrumentality test, as that test provides the best method for determining the excessiveness of civil *in rem* forfeitures.

The instrumentality test recognizes that the appropriate question in the excessiveness analysis is whether and to what extent the subject property has been used to facilitate the claimant's criminal activity. It

should be irrelevant to this analysis that the claimant property owner is deprived of the property, because the owner chose in the first instance to employ the property in furtherance of the crime. For the same reason, the value and nature of the property is irrelevant: the owner chose to use the property—whatever its value might be—to facilitate the crime and thus should not later be heard to argue that loss of the property hurts him "too much." In short, excessiveness should be tied to the guilt of the property, not to its value or to its status vis-a-vis the property owner.

Applying the instrumentality test to the present case, forfeiture of the 4.08 acre farm solely owned by George Aravanis was not excessive, and the Court of Appeals of Maryland was wrong in holding otherwise. By his own admission, Aravanis used his house and adjacent property over a two-month period as the base of a marijuana distribution enterprise. The evidence offered at the forfeiture hearing not only bore this out but demonstrated a more extensive "grow and sell" operation at that site. Aravanis's use of the property was far from incidental; to the contrary, the property was extensively connected to Aravanis's drug operation. Moreover, the home was important to that operation, as it supplied an ideal location for carrying out, in secret, Aravanis's drug dealing. He opted to use his home for this illegal purpose, and should not now be able to complain successfully that forfeiture of that property violates the Excessive Fines Clause of the Eighth Amendment.

CONCLUSION

For the foregoing reasons, Somerset County, Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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December 8, 1995

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Maryland's drug forfeiture statute, MD. ANN. CODE art. 27, § 297 (1992) 40a

APPENDIX A

Court of Appeals of Maryland.

No. 22, Sept. Term, 1994

GEORGE JOSEPH ARAVANIS

v.

SOMERSET COUNTY.

September 13, 1995.

Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, CHASANOW, BELL, RAKER, and JOHN F. McAULIFFE, Judge of the Court of Appeals (Retired and Specially Assigned), JJ.

BELL, Judge.

We granted certiorari to consider whether Maryland's drug forfeiture statute, Maryland Code (1957, 1992 Repl.Vol.), Article 27, § 297, is subject to an excessive fines analysis pursuant to the Eighth Amendment of the United States Constitution,[1] and/or its Maryland

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[1] The Eight [sic] Amendment provides:

counterpart, Article 25 of the Maryland Declaration of Rights.[2] We are also invited, should we find the analysis appropriate, to formulate a test for determining when a particular forfeiture is unconstitutionally excessive. We shall hold that civil *in rem* forfeitures are subject to an excessive fines analysis. Therefore, we shall reverse the trial court's judgment.

I.

George Joseph Aravanis, the appellant, and his wife took title to a farm, including a house, located at 5341 Shelltown Road in Westover, Somerset County, Maryland, as tenants by the entireties, on December 31, 1971. They occupied the property while raising their children until they separated and Mrs. Aravanis moved out. Aravanis continued to occupy the property until they were divorced in 1988. Thereafter, in 1991, a part of the property was sold. The appellant obtained sole title to that portion remaining after the sale. At the same time, he acquired approximately $16,000.00 as his share of the proceeds of the sale. He used part of that amount to purchase marijuana for sale.

A search of the appellant's property was conducted

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

[2] Article 25 provides:

> Excessive bail, fines and punishment.
> That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law.

pursuant to a search and seizure warrant[3] on July 2, 1991. As a result of that search, approximately two pounds of marijuana were seized from a gas barbecue grill located outside the house. Paraphernalia, *i.e.* items commonly used in the drug trade for weighing and packaging drugs, *see* Maryland Code (1957, 1992 Repl.Vol.), Art. 27, § 286(a)(4), consisting of sandwich baggies, found in a bedroom bureau drawer, and a set

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[3] In the Application for Search Warrant, the affiant assured:

> 1. During the three years previous to the search and seizure, various informants and citizens alleged that the appellant was involved in trafficking large quantities of marijuana and other drugs from the property.
> 2. Various family members stated that the appellant had been a user and distributer of drugs for many years.
> 3. The application affiant was given a large quantity of marijuana from one of the family members, who stated that the marijuana had come from the appellant's home.
> 4. Two other individuals stated that they had purchased large quantities of marijuana on three or four occasions from the appellant.
> 5. A confidential informant stated that he/she had purchased marijuana from the appellant on many occasions in the past.
> 6. At least fifteen vehicles were observed by the affiant going to and from the appellant's residence, only to stay for a short time and leave.
> 7. Two purchases of marijuana from the residence took place during the week of June 23, 1991 and June 30, 1991.

of triple beam scales were also seized. Forty-two marijuana plants, ranging in height from five to six feet, were discovered about 150-200 yards north of the residence, but adjacent thereto. The trial court did not consider these plants as evidence supporting forfeiture since the plants apparently were not located on the appellant's property.

The appellant pled guilty to one count of possession of a controlled dangerous substance in sufficient quantity to indicate an intent to manufacture, distribute, or dispense pursuant to Article 27, § 286.[4] He was sentenced to five years imprisonment, three and one-half years of which were suspended.[5] Thereafter, the

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[4] Maryland Code (1957, 1992 Repl.Vol.), Article 27, Section 286 provides, in pertinent part:

> Unlawful manufacture, distribution, etc.; counterfeiting, etc.; manufacture, possession, etc., of certain equipment for illegal use; keeping common nuisance.
> (a) Except as authorized by this subheading, it is unlawful for any person: (1) To manufacture, distribute, or dispense, or to possess a controlled dangerous substance in sufficient quantity to reasonably indicate under all circumstances an intent to manufacture, distribute, or dispense, a controlled dangerous substance.

[5] The appellant was originally charged with three other counts:

> (1) Possession of a Controlled Dangerous Substance,
> (2) Controlled Dangerous Substance Paraphernalia/Use or Possession and

appellee filed a petition to forfeit Aravanis's property.

At the forfeiture trial, the appellee relied upon the application and affidavit for the search and seizure warrant, detailing two controlled buys from the appellant's property, the return showing that 2 1/2 pounds of marijuana and drug paraphernalia were discovered on the property, and the appellant's guilty plea to possession of marijuana with intent to distribute.

Appearing *pro se*, the appellant maintained that the appellee failed to establish, by clear and convincing evidence, that (1) he acquired the real property in question during the period he was violating § 286 and (2) there was no other source for the acquisition of the property, as required by § 297(l).[6] On the other hand,

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(3) Maintaining a Common Nuisance.

These counts were Nolle Prossed upon the trial court's acceptance of the appellant's guilty plea.

[6] Section 297(l), in pertinent part, provides:

> *Presumption of ownership of property.* –
> (1) Except as provided in paragraph (2) of this subsection, when the State establishes by clear and convincing evidence that a person has committed a violation of Article 27, § 286, § 286A, § 286B or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses, there is a rebuttable presumption that any property or any portion thereof in which that person has an ownership interest is subject to forfeiture as proceeds if the State establishes by clear and convincing evidence that:
> (i) The property was acquired by such person during the period in which such person had committed violations of Article 27, § 286, § 286A, § 286B, or § 286C of the Code, or Article

the appellee argued that the forfeiture was controlled by § 297(m).[7] It maintained that § 297(l) applies only

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27, § 290 of the Code in relation to these offenses, or within a reasonable time after such period; and

(ii) there was no likely source for such property other than the violation of Article 27, § 286, § 286A, Section 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses.

(2) Except as provided in subsection (n)(2) of this section, real property used as the principal family residence may not be forfeited under this subsection unless it is shown that one of the owners of the real property was convicted of one or more of the offenses described under paragraph (1) of this subsection.

(3) The burden of proof is on a claimant of the property to rebut the presumption in paragraph (1) of this subsection.

[7] Section 297(m) provides:

(m)(i) Forfeiture of interest in real property.—(1) Except as provided in subsection (l) of this section and paragraph (2) of this subsection, an owner's interest in real property may be forfeited if the real property was used in connection with a violation of Article 27, § 286, § 286A, § 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses.

(ii) An owner's interest in real property may not be forfeited for a violation of Article 27, § 287, or § 287A of the Code.

(2) Except as provided in subsections (l)(2) and (n)(2) of this section, real property used as the

when there are questions as to ownership, and legislative presumptions thereof. It is inapplicable in this case, the appellee asserts, because there is no doubt that the appellant owned the property in question. The trial court agreed. Stating, "there is no doubt that Aravanis owns the real property in question," it determined that subsection (1) was inapplicable as it is "directed towards establishing an ownership in property for which there is no tangible evidence of ownership, *e.g.*, a deed, motor vehicle title or a bill of sale." Memorandum Opinion and Order at 5.[8]

The appellant maintained that he had lived on his property for over twenty years, but had dealt drugs for only two months. Therefore, he argued that forfeiture

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> principal family residence by a husband and wife and held by the husband and wife as tenants by the entirety, and which was used in connection with a violation of Article 27, § 286, § 286A, § 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses, may not be forfeited unless both the husband and wife are convicted of one or more of these offenses.

[8] Recently, in *1986 Mercedes Benz, 560 CE v. State*, 334 Md. 264, 638 A.2d 1164 (1994), we construed § 297(*l*). We there said:

> The section 297(1)(1) presumption relates to the forfeitability of the property as proceeds; it does not address the property's ownership. In other words, the section 297(1)(1) presumption has no relevance to establishing ownership of the property. Who owns the property is an issue the resolution of which is dependent upon the adequacy of the evidence that each party adduces on that issue.

Id. at 279, 638 A.2d at 1171.

of his property was excessive: the "penalty is far beyond the ... crime" and "for this state or this country to take a man's home ... for a few months of illegal activity, is not right." Maintaining that forfeiture was punishment, the appellee argued that it was intended to be harsh. Neither it nor the appellant presented any other evidence concerning the value of either the subject property or of the marijuana seized or as to any other factor bearing on the fairness of the forfeiture. Concluding that "[t]here is no question that the real property at Shelltown Road was used in connection with the distributing and dispensing of marijuana," the court believed that it had no discretion to do anything except order forfeiture. It reasoned that its "only responsibilities are to determine if any statutory exceptions apply ... and whether there has been an adherence to due process...." Opinion and Order of the Court at 9. The court found no exceptions applied and that due process had been met. In doing so, the court acknowledged the harshness of the forfeiture, particularly the subject one, as it relates to the appellant. Nevertheless, it was satisfied that it was justified in light of the legislative intent of Maryland's drug statutes, including § 297. The court pointed out that the latter statute was another "enforcement tool in [the State's] arsenal against the spread of controlled dangerous substances," Order and Opinion of the Court at 7, a "'part of [the State's] "full court press" against the illicit drug traffic.'" *Id.* (quoting *Ewachiw v. Director of Finance of Baltimore City*, 70 Md.App. 58, 60, 519 A.2d 1327, 1328 (1987). The constitutional issue this appeal presents was not expressly addressed.

The appellant appealed to the Court of Special Appeals. We granted certiorari on our own motion prior to that court considering it.

II.

The appellant challenges the forfeiture in this case as an excessive fine under both the Eighth Amendment of the United States Constitution and Article 25 of the Maryland Declaration of Rights. For the former proposition, he relies on *Austin v. United States*, ____ U.S. ____, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), in which the United States Supreme Court held that the Excessive Fines Clause of the Eighth Amendment applies to *in rem* civil forfeitures ordered pursuant to a punitive federal forfeiture statute. Because he maintains that it is binding on the several states, through the Fourteenth Amendment, necessarily, civil forfeitures imposed pursuant to punitive state forfeiture statutes, such as § 297, are also subject to that clause's limitations. Moreover, he asserts, Article 25 of the Maryland Declaration of Rights, is in *para* [sic] *materia* with the Eighth Amendment and, thus, must be interpreted co-extensively with it. As such, the appellant contends that, even if this Court were to determine that the Excessive Fines Clause of the Eighth Amendment is inapplicable, the Excessive Fines clause in Article 25 is applicable.

A.

At issue in Austin was "whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 USC §§ 881(a)(4) and (a)(7)." ____ U.S. at ____, 113 S.Ct. at 2803, 125 L.Ed.2d at 494. To resolve that issue, the Court perceived the question to be "not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment." *Id.* at

___, 113 S.Ct. at 2806, 125 L.Ed.2d at 497. This formulation of the issue was compelled by the purpose of the Eighth Amendment in general and the Excessive Fines Clause in particular. Relying on *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), the Court observed:

> The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish.... The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, "*as punishment* for some offense." (Citation omitted)

____ U.S. at ____, 113 S.Ct. at 2805, 125 L.Ed.2d at 497 (quoting *Browning-Ferris*, 492 U.S. at 265, 109 S.Ct. at 2915, 106 L.Ed.2d at 232).

The Court held that §§ 881(a)(4) and (a)(7) are punitive. It was led to that conclusion by four factors: (1) "forfeiture generally and statutory *in rem* forfeitures in particular, historically have been understood, at least in part, as punishment," ____ U.S. at ____, 113 S.Ct. at 2810, 125 L.Ed.2d at 503; (2) both § 881(a)(4) and § 881(a)(7) contain an "innocent owner" defense or exemption, which, because it "reveals a ... congressional intent to punish only those involved in drug trafficking," *id.* at ____, 113 S.Ct. at 2811, 125 L.Ed.2d at 504, "serve[s] to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less," *id.* at ____, 113 S.Ct. at 2810, 125 L.Ed.2d at 503; (3) Congress chose to tie forfeiture under §§ 881(a)(4) and (a)(7) directly to the commission of drug offenses, by permitting forfeiture of a vehicle or real property on the basis of its use or intended use to facilitate either the transportation of

drugs or the commission of a drug related crime punishable by more than one year's imprisonment, *id.* at ____, 113 S.Ct. at 2811, 125 L.Ed.2d at 504; and (4) the forfeiture statute's legislative history, which reveals Congress' admission "that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs" and its belief that real property forfeiture is "a powerful deterrent," raises the inference that those sections are punitive. *Id.*

The *Austin* court rejected the government's argument that the subject forfeiture provisions were remedial in two respects. While acknowledging that the forfeiture of contraband is remedial because it removes dangerous or illegal items from society, ___ U.S. at ___, 113 S.Ct. at 2811, 125 L.Ed.2d at 504-05, *citing United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364, 104 S.Ct. 1099, 1105, 79 L.Ed.2d 361, 369-70 (1984), the Court refused to characterize a mobile home and auto body shop, the property seized in that case, as "instruments" of the drug trade. *Id.* It noted, in that regard, that "there is nothing even remotely criminal in possessing, [them]," *id.* ____ U.S. at ____, 113 S.Ct. at 2811, 125 L.Ed.2d at 505 (quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 85 S.Ct. 1246, 1250, 14 L.Ed.2d 170, 174 (1965)).

The Court similarly was unimpressed by the government's argument that the forfeited items compensated the government for its expenditures for law enforcement activity and "on societal problems such as urban blight, drug addition [sic], and other health concerns resulting from the drug trade." *Id.* As to that, the Court was of the view that, given "the dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7)," *id.*, "the 'forfeiture of property ... [is] a penalty that has

absolutely no correlation to any damages sustained by society or to the cost of enforcing the law.'" *Id.* ____ U.S. at ____, 113 S.Ct. at 2812, 125 L.Ed.2d at 505 (quoting *United States v. Ward*, 448 U.S. 242, 254, 100 S.Ct. 2636, 2644, 65 L.Ed.2d 742, 753 (1980).

Section 297 is, like § 881, a civil *in rem* forfeiture statute, *see 1986 Mercedes Benz 560 CE v. State*, 334 Md. 264, 273, 638 A.2d 1164, 1168 (1994), of the type that "historically [has] been understood, at least in part, as punishment." *See Austin*, ____ U.S. at ____, 113 S.Ct. at 2810, 125 L.Ed.2d at 503. Moreover, the applicable provisions are similar to the provisions construed in *Austin*.

Section 297(b)(9) subjects to forfeiture "[i]n the manner provided under subsection (l) and (m) of this section, all real property." Section 297(c) defines property not subject to forfeiture. It provides:

> Property or an interest in property described under subsections (b)(4), (9) and (10) of this section may not be forfeited if the owner establishes by a preponderance of the evidence that the violation of this subheading was done without the owner's actual knowledge.

In *1986 Mercedes Benz, 560 CE*, *supra*, construing subsection (1), the provisions of which we characterized as clear and unambiguous, we said:

> It is rebuttably presumed that property which a person owns or in which he or she has an ownership interest constitutes proceeds and, hence, is subject to forfeiture, whenever the State, by clear and convincing evidence proves that: (1) the person has committed one or more of several enumerated controlled dangerous substances offenses; (2) the person acquired the property during the period in which, or within a reasonable time after, the violation or violations occurred; and (3) the violation was the

only likely source of the property.
Id. at 278-79, 638 A.2d at 1171. Subsection (m) references certain drug activity, engagement in which subjects property used therewith to forfeiture. Among the drug activity proscribed is possession of a controlled dangerous substance in sufficient quantity to reasonably indicate under all circumstances an intent to distribute a controlled dangerous substance. *See* § 286(a)(1).

The applicable forfeiture provision in this case is § 297(m). Because § 297(c) references subsection (b)(9), which in turn refers to subsection (m), the exemptions contained in subsection (c), are also applicable to subsection (m). Thus, § 297(m), like §§ 881(a)(4) and (a)(7) of the federal statute, contains an innocent owner exemption. That, in addition to knowledge, the federal statute refers to the consent or willful blindness of the owner does not require or suggest a different result. *See United States v. One Parcel of Real Estate at 6640 Southwest 48th Street*, 831 F.Supp. 1578, 1585 (S.D.Fla.1993); *United States v. 2901 Southwest 118th Court*, 683 F.Supp. 783, 788 (S.D.Fla.1988).

Furthermore, forfeiture in the case of subsection (m) is tied, as in the federal statute, to various drug offenses, including, as applicable herein, the possession with intent to distribute a controlled dangerous substance. Finally, the legislative history of § 297 in general, *State v. One 1984 Toyota Truck*, 311 Md. 171, 177, 533 A.2d 659, 661-62 (1987); *Pr. George's Co. v. One 1969 Opel*, 267 Md. 491, 495, 298 A.2d 168, 170 (1973) and subsection (m),[9] in particular, Floor

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[9] Subsection (m) was added to § 297 by Ch. 586, Laws 1989. The federal statute was amended to cover real property 5 years earlier, in 1984. *See* Act of Oct. 12, 1984, Pub.L. No. 98-473, 1984 (codified as 21 U.S.C. § 881(a)(7)).

Report on Senate Bill 419 at 1, reveals a purpose, like that of the federal forfeiture statute, to "deter crime by creating civil procedures governing the forfeiture of property and proceeds derived from enumerated CDS offenses, or used to commit or facilitate these crimes." That history also indicates that the Legislature, like Congress, intended forfeiture to be "a powerful prosecutorial tool for stopping CDS offenders and depriving them of the huge profits reaped from their illegal activities." Floor Report at 4. Therefore, the construction of the federal statute is persuasive as to the meaning of the Maryland statute. *See Allen v. State*, 91 Md.App. 775, 783, 605 A.2d 994, 998, *cert. denied*, 328 Md. 92, 612 A.2d 1315 (1992). It is also relevant that the State and the trial court held that the purpose of the Maryland forfeiture statute is, at least in part, punitive.

Accordingly, it follows that § 297, and in particular subsection (m) is, like §§ 881(a)(4) and (a)(7), a punitive statute, the purpose of which is to require "direct payment to a sovereign as punishment for some offense." *Browning-Ferris*, 492 U.S. at 265, 109 S.Ct. at 2915, 106 L.Ed.2d at 232.

B.

The appellant argues that the Excessive Fines Clause of the Eighth Amendment is applicable to the forfeiture *sub judice*. We do not reach that issue, however, because we hold that the excessive fines provision of Article 25 of the Maryland Declaration of Rights applies.[10] Article 25 is, textually and historically,

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[10] We note, as did the appellant in argument, that although the Supreme Court has never decided whether the

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excessive fines provision of the Eighth Amendment is applicable to the several states, at least one Justice of the Supreme Court sees no reasonable basis for treating it differently than the Cruel and Unusual Punishment Clause or the Excessive bail clause. *See Browning-Ferris Industries v. Kelco Disposal Inc.*, 492 U.S. 257, 284, 109 S.Ct. 2909, 2925, 106 L.Ed.2d 219, 244 (O'Connor, J. concurring in part and dissenting in part) ("since *Robinson [v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)] the Cruel and Unusual Punishment Clause has been regularly applied to the States [and] the Court has assumed that the Excessive Bail Clause ... applies to the States. I see no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation, and would hold that the Excessive Fines Clause also applies to the States."). Indeed, this Court, in *Randall Book Corp. v. State of Maryland*, 316 Md. 315, 332, 558 A.2d 715, 724 (1989) seemed to apply the Excessive Fines Clause to its review of a defendant's claim that a fine imposed for a pornography conviction was grossly disproportionate to the underlying criminal activity. It ultimately concluded that "the cumulative punishments did not mount up to an excessive fine or to cruel or unusual punishment within the meaning of the Eighth Amendment." *Id.* Moreover, the Attorney General in an *amicus curia* brief filed in the *Austin* case expressed belief that "[t]here is little doubt that the Eighth Amendment prohibition against ... excessive fines ... would apply to the states." Finally, a number of States, *albeit* without analysis, have applied the Excessive Fines Clause of the Eighth Amendment in resolving challenges to forfeitures under state forfeiture statutes. *See e.g., Pickard v. City of Vero Beach*, 629 So.2d 957, 959 (Fla.Dist.Ct.App.1993); *Idaho Dept. of Law Enf. v. Real Property located in Minidoka County*, 885 P.2d 381, 383 (Idaho 1994); *People Ex Rel. Waller v. 1992 Oldsmobile Stationwagon*, 265 Ill.App.3d 93, 202 Ill.Dec. 727, 729, 638 N.E.2d 373, 375 (1994); *City of Akron v. Turner*, 91 Ohio App.3d 595, 632

substantially identical to the Eighth Amendment. Indeed, both of them were taken virtually verbatim from the English Bill of Rights of 1689. *Walker v. State*, 53 Md.App. 171, 183, 452 A.2d 1234, 1240 (1982), citing *Phipps v. State*, 39 Md.App. 206, 211, 285 A.2d 90, 93-4 (1978). Thus, it is well settled in this State that Article 25 of the Maryland Declaration of Rights is *in para* [sic] *materia* with the Eighth Amendment. *See Minor v. State*, 313 Md. 573, 589 n. 4, 546 A.2d 1028, 1035 n. 4 (1988) (Eldridge, J. concurring). Indeed, the excessive fines provision of Article 25 was one of eight such provisions which served as a model for the Excessive Fines Clause of the Eighth Amendment. *See Browning-Ferris*, 492 U.S. at 264 n. 5, 109 S.Ct. at 2915 n. 5, 106 L.Ed.2d at 231 n. 5. Thus, the excessive fines provision of Article 25 should be interpreted co-extensively with the excessive fines provision of the Eighth Amendment.

III.

The *Austin* court declined Austin's invitation "to establish a multi-factor test for determining whether a forfeiture is constitutionally 'excessive.'" ____ U.S. at ____, 113 S.Ct. at 2813, 125 L.Ed.2d at 505. It explained:

> Although the Court of Appeals opined "that the government is exacting too high a penalty in relation to the offense committed, ... it had no occasion to consider what factors should inform such a decision because it thought it was foreclosed from engaging in

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N.E.2d 1374, 1376 (1993); *S.A.S., Inc. v. Commonwealth*, 162 Pa.Cmwlth. 263, 638 A.2d 455, 460 (1994).

> the inquiry. Prudence dictates that we allow the lower courts to consider that question in the first instance.

Id. (citations omitted). The Court pointed out, however, that it did not "rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive." *Id.* at ____ n. 15, 113 S.Ct. at 2812 n. 15, 125 L.Ed.2d at 505 n. 15.

The latter comment was in response to Justice Scalia's concurring opinion proffering an instrumentality test as the proper standard by which the excessiveness of fines must be judged under the Eighth Amendment. Agreeing that the forfeiture in that case "works as a fine" and, thus, raises the excessiveness issue, Justice Scalia stated his belief that "the excessiveness analysis must be different from that applicable to monetary fines and, perhaps, to *in personam* forfeitures," in which "the touchstone is the value of the fine in relation to the offense." *Id.* at ____, 113 S.Ct. at 2814-15, 125 L.Ed.2d at 508. Commenting on the relevance of the offense of which the defendant is convicted to the property sought to be forfeited, Justice Scalia argues:

> But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense--the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine. The question is not how much the confiscated property is worth but whether the confiscated property has a close enough relationship to the offense.

___ U.S. at ____, 113 S.Ct. at 2815, 125 L.Ed.2d at

509. According to Justice Scalia, therefore, the relevant inquiry involves asking whether the relationship of the property to the offense is "close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?" *Id.*

Since the *Austin* decision, a number of courts have been faced with the task of formulating a test by which to assess whether an *in rem* forfeiture is excessive under the Excessive Fines Clause of the Eighth Amendment or a comparable State provision. The results have not been uniform. Some courts have adopted the instrumentality test espoused by Justice Scalia. *See United States v. Chandler*, 36 F.3d 358 (4th Cir.1994);[11] *One Ford Motor Vehicle VIN # 1 FACP41A8LF217570 v. State*, 104 Md.App. 744, 657 A.2d 825 (1995); *In Re King Properties*, 535 Pa. 321, 635 A.2d 128 (1993); *SAS, Inc. v. Commonwealth*, 162 Pa.Cmwlth. 263, 638 A.2d 455 (1994). Other courts, indeed the majority, have combined the instrumentality test with some form of a proportionality test. *See e.g. United States v. R.R. No. 1, Box 224*, 14 F.3d 864, 875 (3d Cir.1994) (adopting the test of *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)– weighing gravity of offense and harshness of penalty, and sentences imposed

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[11] Shortly after the *Austin* decision, the Fourth Circuit, in the context of a remand of a forfeiture case to the district court for further proceedings, indicated, albeit *in dicta*, that in light of *Austin* "an inquiry into the proportionality between the value of the instrumentality sought to be forfeited and the amount needed to effectuate the legitimate remedial purposes of the forfeiture would seem to be in order." *United States v. Borromeo*, 1 F.3d 219, 221 (4th Cir.1993). That inquiry, as *U.S. v. Chandler*, 36 F.3d 358 (4th Cir.1994) attests, is no longer the appropriate one in that circuit.

in the same and other jurisdictions for same offense, taking account of "the absolute magnitude of the crime" and the "culpability of the offender"); *United States v. Alexander*, 32 F.3d 1231, 1238 (8th Cir.1994) (for purposes of proportionality, consider extent and duration of criminal activities, gravity of offense, value of property forfeited, specific facts involved in case, sentences imposed, and factors identified in *United States v. Sarbello*, 985 F.2d 716, 724 (3rd Cir.1993), *i.e.* personal benefit reaped by defendant, his or her sentence, and extent that defendant and the property are "guilty"); *United States v. 9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir.1994) (monetary value of property, nature and use of the property, effect of forfeiture on innocent users of property);[12] *United States v. 18755 North Bay Road*, 13 F.3d 1493, 1498 (11th Cir.1994) (opting for proportionality analysis, court determined that it is appropriate to measure seriousness of offense by looking at whether conduct was the sort Congress intended the forfeiture laws to punish); *United States v. 461 Shelby County Road*, 857 F.Supp. 935, 938 (N.D.Ala.1994) (financial condition of defendant, nature and use of property forfeited, culpability of owner); *United States v. One Parcel Property at 427 & 429 Hall St.*, 853 F.Supp. 1389, 1399-1400 (M.D.Ala.1994) (using instrumentality test as threshold—if sufficient nexus—consider whether forfeiture is grossly disproportionate, given the nature of

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[12] The court reversed the district court decision in *United States v. 9638 Chicago Heights*, 831 F.Supp. 736 (E.D.Mo.1993), which had applied the *Scalia* instrumentality test as the sole factor informing forfeiture.

offense involved);[13] *United States v. 6625 Zumirez Drive*, 845 F.Supp. 725, 732 (C.D.Cal.1994) (combining instrumentality test with gravity of offense and harshness of penalty, and extensiveness of criminal activity); *United States v. 24214 Lemay Street*, 857 F.Supp. 1373, 1382 (C.D.Cal.1994) (same); *United States v. One 1990 Ford Ranger Truck*, 876 F.Supp. 1283 (N.D.Ga.1995) (applying a modified *427 & 429 Hall Street* analysis—the second prong of which measures not value of the property, but hardship engendered by forfeiture.); *United States v. Rural Route 1*, 1994 WL 194172 (N.D.Ill.1994) (the *Zumirez* test); *United States v. Real Property: 835 Seventh Street Rensselaer*, 820 F.Supp. 688, 689 (N.D.N.Y.1993) (adopting the pre-*Austin* test formulated by the court in *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir.1992))[14]; *United States v. Shelly's Riverside*

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[13] Prior to the decision in *United States v. 18755 North Bay Road*, 13 F.3d 1493 (11th Cir.1994), the district court had adopted the instrumentality test as the sole measure of excessiveness. *United States v. 427 & 429 Hall Street*, 842 F.Supp. 1421 (M.D.Ala.1994).

[14] The test addresses proportionality within the context of a Cruel and Unusual Punishment Clause analysis. It is multi-factored. Under the first factor, the court determines whether the property is substantially used for illegal purposes. If it is, then the total value of the drugs involved in the underlying criminal activity is compared to the total value of the property subject to forfeiture. Forfeiture is presumptively excessive if the value of the latter is disproportionate to the value of the former. That presumption may be rebutted, however, by the government's "cost of investigation and detection, as well as other costs

Heights Lot X, 851 F.Supp. 633 (M.D.Pa.1994) (applying the tri-part test of *Solem v. Helm*, *supra*; *Idaho v. Real Property Located in Minidoka County*, 126 Idaho 422, 425, 885 P.2d 381, 384 (1994) (remanding case for development of test for determining excessiveness, noting the Austin court's refusal to limit the lower courts to consideration of the relationship between the forfeited property and the offense); *People v. 1992 Oldsmobile Stationwagon*, 265 Ill.App.3d 93, 202 Ill.Dec. 727, 730-31, 638 N.E.2d 373, 376-77 (1994) (noting the appropriateness of considering whether too high a penalty has been exacted, given the offense committed, and relevance of the defendant's ability to pay on the issue of forfeiture); *Fant v. Texas*, 881 S.W.2d 830, 832-33 (Tex.App.1994) (in deciding whether prior forfeiture of the defendant's property barred subsequent criminal prosecution, the court considered that the penalty of forfeiture was intended to be imposed on those involved in criminal activity). At least one court has decided the case before it by applying both the instrumentality test and a proportionality test, comparing value of property against the nature of the offense. *United States v. 11869 Westshore Drive*, 848 F.Supp. 107, 111 (E.D.Mich.1994).

Chandler presents a forceful and well articulated defense of the instrumentality test. The court formulated a three part test for determining the excessiveness of an *in rem* forfeiture under the Eighth Amendment. That test "considers (1) the nexus between

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and damages attributable to the criminal misconduct of the claimant." *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 37 (2nd Cir.1992).

the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder." 36 F.3d at 365.

Underlying the first factor is the notion "that Congress, in providing for civil forfeiture of property involved in drug offenses for which punishment exceeds one year, ... did not intend to punish or fine by a particular amount or value; instead, it intended to punish by forfeiting property at whatever value which was *tainted* by the offense. Accordingly, the constitutional limitation on the government's action must be applied to the degree and the extent of the taint, and not to the value of the property or the gravity of the offense." *Id.* at 364. (Citation omitted) Given this primary focus, the court formulated additional factors to be considered "[i]n measuring the strength and extent of the nexus between the property and the offense": (1) the extent to which the use of the property was deliberate and planned or merely incidental and fortuitous; (2) the property's importance to the success of the illegal activity; (3) how long the property was used and the spatial extent of its use; (4) whether the illegal use was isolated or repetitive; and (5) the purpose for acquiring, maintaining or using the property. *Id.* at 365.

The second factor gives recognition to the fact that the forfeiture statute is a punitive statute and that the person punished is the owner of the property. *Id.* at 364. The final factor is a pragmatic one which explores the possibility of separating the tainted property from non-implicated property, when it is readily separable. *Id.*

The test developed by the *Chandler* court does not include a proportionality factor. This is so because the

court rejected proportionality as an aspect of the Eighth Amendment's Excessive Fines Clause, reasoning that *Solem v. Helm*, *supra*, from which the proportionality analysis derives, has been undermined by *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991),[15] *id.* at 365, and that the proportionality principle, if it exists at all, in the Eighth Amendment, derives from the Cruel and Unusual Punishment Clause and not the Excessive Fines Clause. Id. at 365-66.

Although by no means representative of this class of case—as we have seen, there are a variety of multi-factor tests, using a variety of proportionality factors—*6625 Zumirez Drive* is both instructive and persuasive. In that case, the court developed a three-factor test for determining whether a forfeiture violates the Excessive Fines Clause:

> (1) the inherent gravity of the offense compared with the harshness of the penalty; (2) whether the property was an integral part of the commission of the crime; and (3) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use.

845 F.Supp. at 732 (footnote omitted). No single factor

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[15] In support of this proposition, the *Chandler* court pointed out that, in *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), two justices flatly rejected the proportionality principle as a part of the Eighth Amendment, *id.* at 964-66, 111 S.Ct. at 2686, 115 L.Ed.2d at 846, and that three others would limit the scope of *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), by holding that the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime," rather than requiring strict proportionality between the crime and the sentence. *Id.* at 1000, 111 S.Ct. at 2705, 115 L.Ed.2d at 869.

was deemed to be dispositive. *Id.*

Although the first factor was derived from *Solem*, *supra*, the court made clear why it is appropriately applied in the excessive fines context, because "[t]he word 'excessive' in the Excessive Fines Clause implicitly prohibits those fines that exceed the crime alleged." *Id. See also 9638 Chicago Heights*, 27 F.3d at 330 (after pointing out the Supreme Court's refusal to adopt the instrumentality test, finding it "inadequate because it conflates the Eighth Amendment excessive fine analysis with the section 881(a)(7) nexus requirement."); *United States v. R.R. # 1*, Box 224, 14 F.3d at 873 (noting that majority did not adopt Justice Scalia's proposed test and warning against "conflating the Eight [sic] Amendment inquiry with section 881(a)(7)'s nexus requirement"); *One 1990 Ford Ranger*, 876 F.Supp. at 1287 ("a forfeiture can only be 'excessive' if it is compared to something else"). Addressing when this factor is applicable, the court asserted that the conduct for which the forfeiture penalty is imposed may range from conviction for the criminal act underlying the forfeiture to acquittal of those acts and that the focus should be on the claimant's or owner's conduct. 845 F.Supp. at 733. In that regard, it said, an owner who has been acquitted has engaged in behavior less grave than one who has never been charged, which is, in turn, less grave than that of one who has been charged and convicted of the criminal conduct. *Id.* The court explained that not only must the owner's culpability be considered in connection with the gravity prong, but it also must be considered, along with the monetary and intangible value of the property forfeited, in evaluating the harshness of the penalty imposed. *Id.* at 733-34.

The second factor is the instrumentality test. Derived from the Scalia concurring opinion, its focus is on

whether the property was an integral part of the commission of the crime. *Id.* at 734. Unlike Justice Scalia, however, included in the analysis is an assessment of the culpability of the property owner and the property; according to the court, that is a necessary aspect of excessive fines analysis. *Id.* at 733-34. Concluding that the *Austin* court majority held that civil forfeiture punishes, at least in part, the claimant for offensive conduct and, thus, at least implicitly, recognized the appropriateness of analyzing whether the fine is excessive in comparison with the claimant's conduct, the court, also focusing on Justice Scalia's statement of the relevant inquiry: "the relationship of the property to the offense," *see Austin*, ____ U.S. at ____, 113 S.Ct. at 2815, 125 L.Ed.2d at 509 (Scalia, J. concurring), rejects Justice Scalia's apparent disregard of the role of the owner in causing the forfeiture. It points out:

> [T]he use of the word "offense" in the phrase "relationship of the property to the offense" implies that an offense or at least offensive conduct has occurred, giving rise to the civil forfeiture. Since the claimant is the person punished for the offense, and since an offense cannot occur without some human participation, it would be illogical not to consider relevant the extent of the claimant's involvement in the offense. By addressing both the claimant's and the property's relationship to the offensive conduct, the Court believes that its multifactor test accurately determines whether the punishment imposed by a civil forfeiture violates the Excessive Fines Clause.

845 F.Supp. at 734 n. 4.

The final factor looks at the extent to which the property was used in the criminal activity. "Under this factor, the Court looks not only at whether the defendant property was an integral part of the criminal activity,

but whether the defendant property played an extensive or pervasive role in the commission of the crime." *Id.* at 734.

The requirements of the Excessive Fines Clause of the Eighth Amendment and, hence, of Article 25 of the Maryland Declaration of Rights, mandate that recognition and effect be given to the use of the word "excessive" in that clause and to the *Austin* court's holding that a civil forfeiture is punishment. In order that a forfeiture constitutes punishment, it must necessarily have as its object, in addition to the property itself, some person. Notwithstanding the argument made by Justice Scalia and the cases adopting it, logically that person is the owner of the property. It is appropriate, therefore, that the owner's culpability with respect to the underlying criminal activity be considered. While the relationship of the property to the offense is, as most courts recognize, a relevant and important factor, it is not, as the *Austin* court recognized, the only factor. But that is precisely what the instrumentality test, considered alone, does—"it conflates the Eighth Amendment excessive fines analysis with the § 881(a)(7) nexus requirement." *9638 Chicago Heights*, 27 F.3d at 330. The Excessive Fines Clause requires more.

Accordingly, we conclude that resolution of a claim that a forfeiture of property violates the constitutional prohibition against imposition of excessive fines necessarily requires consideration of not only those factors involved in "instrumentality" test, but also factors of proportionality that compare the gravity of the offense or offenses involving the property and the extent of involvement of the owner with the enormity of the loss to the owner occasioned by the forfeiture. Thus, while the several factors set forth in *U.S. v. Chandler*, *supra*, 36 F.3d at 365, provide a sound basis for evaluating the relationship between the property and the

illegal activity, the enormity of the loss to the owner, the gravity, scope, and duration of the illegal activity, and the degree of the owner's culpability also must be considered.[16] Proportionality, as that term is used here, does not include the necessity to compare forfeiture laws or practices of other jurisdictions—it means simply that there must be a comparison of the extent of the loss to the relevant factors involved, including the gravity and extent of the illegal activity, the nexus between that conduct and the subject property, and the extent of involvement of the owner—all to determine whether the "fine" is out of all reasonable proportion to the relevant factors.

It would be premature for us to propose, by this opinion, a precise formula or laundry list of factors to fit every case that will come before the courts. We can at this juncture only paint with a rather broad brush, identifying the required areas of consideration and the non-exclusive list of factors we have discussed, leaving

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[16] Proof of the relevant factors in a forfeiture case is not limited to a particular offense charged. Proof of the duration and extent of the course of criminal activity and its nexus to the property may be appropriate, and the State may well wish to show the extent of profit to the owner from this course of conduct because that fact bears on the question of how much the owner actually loses by the forfeiture. Profits from the illegal activity may be shown by direct evidence, or indirectly through a showing of net worth of the owner and the absence of other known or demonstrable sources of income.

to the trial judges in the first instance the weighing of factors appropriate to each individual case.[17]

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[17] The State argues that the Maryland General Assembly has already considered, and decided, the proportionality issue; hence, there is no occasion for this Court to do so again. It offers as reasons for that conclusion the fact that § 297(m)(1)(ii) limits forfeiture eligibility to property involved in certain "serious" crimes, while the federal statute did not. We reject that argument. Both the Excessive Fines Clause of the Eighth Amendment and the comparable clause in Article 25 address "excessive fines imposed," in the case of Maryland, "'by the courts of law'." Consequently, the clause protects, more clearly in the case of Maryland, against fines actually "imposed" by a court, rather than those considered and either adopted or rejected by a legislature. *See Idaho v. Real Property Located in Minidoka County*, *supra*. In that case, a similar argument was made to the Supreme Court of Idaho, with respect to a provision in the State forfeiture statute, which provided, "the size of the property forfeited shall not be unfairly disproportionate to the size of the property actually used in violation of the provisions of this section." *Id.* at 383. Recognizing that the legislature did address the excessive fines issue in the statute, the court also rejected the argument that the statute was not subject to excessive fines analysis. The court explained:

> The fact that the statute purports to limit the size of property which could be taken does not preclude the possibility that the property actually taken could constitute an excessive fine under the Eighth Amendment. Subsection (e) cannot shield the forfeiture from Eighth Amendment review.

885 P.2d at 383-84.

JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY VACATED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY SOMERSET COUNTY.

APPENDIX B

State of Maryland Somerset County Logan C. Widdowson State's Attorney for Somerset County	*	In the Circuit Court for
v.	*	Somerset County, MD
The fee simple interest in, and improvements on, the real property generally described as all that tract or parcel of land situated in Brinkley's Election District, Somerset County, State of Maryland as described in deed made the 17th day of April, 1991 from Margaret F. Aravanis Bishop to George Joseph Aravanis as recorded among the Land Records of Somerset County in Book 396, page 492, et seq.	*	Civil No. 92CA02640

Opinion and Order of Court

The State's Attorney for Somerset County acting on behalf of the Somerset County Narcotics Task Force (hereinafter referred to as "the State") has filed a Petition for Forfeiture of Real Property requesting this Court to condemn and forfeit to the Task Force the real property solely owned by George Joseph Aravanis (hereinafter referred to as "Aravanis") and located in the

Brinkley's Election District of Somerset County.

Aravanis and his former wife, Margaret F. Aravanis, acquired the real properly in question by deed dated December 31, 1971, and recorded at Liber ITP No. 264, folio 424. On April 17, 1991, by deed recorded at Liber ITP No. 396, folio 492, Mrs. Aravanis conveyed to Mr. Aravanis all her right, title and interest in the property consisting of 4.08 acres of land, more or less, located on the easterly side of the Shelltown Road.

On January 23, 1992, in the Somerset County Circuit Court (case number 91CR02373), Aravanis entered a plea of guilty to the second count of a criminal information charging him with Possession of Controlled Dangerous Substance in Sufficient Quantity to Indicate an Intent to Manufacture, Distribute or Dispense in violation of Article 27, section 286 of the Annotated Code of Maryland.[1] He was sentenced to serve five years in the custody of the Commissioner of Corrections. All but eighteen months of the sentence was suspended, with Aravanis' sentence beginning on October 22, 1991.

The State alleged that the property sought to be forfeited was being occupied by Aravanis and used for the purposes of manufacturing and distributing controlled dangerous substances on or about the time of

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[1] Aravanis was originally charged with three other counts in the case: (1) Possession of a Controlled Dangerous Substance, (2) Controlled Dangerous Substance Paraphernalia/Use or Possession and (3) Maintaining a Common Nuisance. These counts were subject to a Motion for Nolle Prosequi offered by the State's Attorney. Nolle Prosequi was entered upon acceptance of Aravanis' plea of guilty.

the execution of a search warrant in 1991.[2]

The State was represented at the hearing on forfeiture by Logan C. Widdowson, Esquire. Aravanis appeared pro se.

The sole question before the Court is whether the State has met its burden set forth in Article 27, section 297 thereby warranting this Court's order for forfeiture of Aravanis' real property.

The pertinent portions of Article 27, section 297 provide as follows:

(a) (11) (i) "Property" includes:

1. Real property and anything growing on or attached to real property;

. . . .

(a) (12) (i) "Real Property" means any land or improvements to land.

. . . .

(b) *Property subject to forfeiture.* - The following shall be subject to forfeiture and no property right shall exist in them:

. . . .

(b) (9) In the manner provided under subsection (*l*) and (*m*) of this section, all real property;

. . . .

(l) *Presumption of ownership of property.* - (1) Except as provided in paragraph (2) of this subsection, when the State establishes by clear and convincing evidence that a person has committed a violation of Article 27, section 286, section 286A, section 286B, or section 286C of the Code,

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[2] Aravanis was arrested in October, 1991, following the execution of a search warrant on July 2, 1991, in which more than two and one half pounds of marijuana and items of drug paraphernalia were seized from his residence on Shelltown Road.

or Article 27, section 290 of the Code in relation to these offenses, there is a rebuttable presumption that any property or any portion thereof in which that person has an ownership interest is subject to forfeiture as proceeds if the State establishes by clear and convincing evidence that:

(i) The property was acquired by such person during the period in which such person had committed violations of Article 27, section 286, section 286A, section 286B, or section 286C of the Code, or Article 27, section 290 of the code in relation to these offenses, or within a reasonable time after such period; and

(ii) There was no likely source for such property other than the violation of Article 27, section 286, section 286A, section 286B, or section 286C of the Code, or Article 27, section 290 of the Code in relation to these offenses.

(2) Except as provided in subsection (n)(2) of this section, real property used as the principal family residence may not be forfeited under this subsection unless it is shown that one of the owners of the real property was convicted of one or more of the offenses described under paragraph (1) of this subsection.

. . . .

(m) *Forfeiture of interest in real property.* - (1)(i) Except as provided in subsection (*l*) of this section and paragraph (2) of this subsection, an owner's interest in real property may be forfeited if the real property was used in connection with a violation of Article 27, section 286, section 286A, section 286B or section 286C of the Code, or Article 27, section 290 of the Code in relation to these offenses.

At the hearing on forfeiture the testimony by State's

witness Milton J. Hall disclosed that more than two and one half pounds (1,128 grams) of marijuana were found and seized in a bag near the back steps of Aravanis' house on Shelltown Road. There was other evidence presented at the hearing that two controlled purchases of marijuana were made by the State from Aravanis' property within a short period prior to execution of the search warrant and that items of paraphernalia were recovered at the time of the search of the property.

Aravanis candidly testified at the hearing that for two months he used a part of a $16,000.00 settlement amount to purchase drugs and started dealing marijuana.[3] Aravanis represented that prior thereto he was a drug user.

Aravanis' defense to the Petition for Forfeiture is based on two primary grounds. First, he argues that the provisions of Article 27, section 297(l) should be applied to his case and avers that pursuant to that subsection the State has failed to establish by clear and convincing evidence (1) that he acquired the real property in question during the period he violated the prohibitions of Article 27, section 286 and (2) there was a source for the acquisition of his property other than [through] a violation of that section of the criminal code. Second, he contends that "the penalty (forfeiture of his real property) is far beyond the crime."

The Court believes that Aravanis' position as to the first point of his defense is inaccurate. The State correctly suggests that the forfeiture of real property

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[3] It is not completely clear from Aravanis' testimony as to the origin of the $16,000.00, a part of which was used to purchase marijuana. The inference the Court drew from the testimony was that the monies may have been a part of a divorce settlement. The source of the monies is not crucial to the Court's decision.

when ownership is not in question is controlled by Article 27, section 297(m), not by Article 27, section 297(l). Subsection (l) relates to questions of ownership and the legislative presumptions thereof. In this case there is no doubt that Aravanis owns the real property in question, having acquired joint title in 1971 and sole title in 1991. State's Exhibit No. 1 is a copy of a deed reflecting Aravanis' ownership of the property.

A fair reading of the statute would lead the Court to believe that the provisions of subsection (l) are directed towards establishing an ownership interest in property for which there is no tangible evidence of ownership, e.g., a deed, motor vehicle title or a bill of sale. Indeed the only reference in subsection (l) as to real property is found in paragraph (l)(2):

> Except as provided in subsection (n)(2) of this section, real property used as the principal family residence may not be forfeited under this subsection unless it is shown that one of the owners of the real property was convicted of one or more of the offenses described under paragraph (1) of this subsection.

Aravanis was convicted of one of the offenses described under paragraph (1) of the subsection. Consequently the subsection (l) has no application in this case.

The cardinal rule for statutory construction is to determine and carry out the legislative intent.

> In determining that intent the Court considers the language of an enactment in its natural and ordinary signification. A corollary to this rule is that if there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intent of the General Assembly. *Balto. Bldg. & Constr. Trades v. Barnes*, 290 Md. 9, 15, 427 A.2d 979, 982

(1981).

The canons of construction dictate that "statutes dealing with the same subject matter should, when possible, be read together and harmonized." *Kaczorowski v. City of Baltimore*, 309 Md. 505, 511, 525 A.2d 628,631 (1987).

When subsection (l) is read in connection with subsection (m) of Article 27, section 297, it is clear that the only application that subsection (l) would have to the facts herein relates to whether the property was used as a family residence and whether Aravanis was convicted of one of the specified charges in that same subsection.

Aravanis also argues that forfeiture of his property is a harsh penalty, considering that he has served time in the local detention center for his criminal conviction in the matter on which this forfeiture proceeding is based.

In *Ewachiw v. Director of Finance of Baltimore City*, 70 Md. App. 58, 60, 519 A.2d 1327, 1328 (1987), Judge Moylan summarized the legislative intent behind the enactment of Maryland's drug statutes:

> The Maryland General Assembly in 1970[1] enacted a comprehensive statute designed to control trafficking in controlled dangerous substances. As part of its "full court press" against the illicit drug traffic, it provided for the forfeiture to the State of all money or currency found to have been used or intended for use in connection with the drug traffic. As we turn our appellate review to one such instance of forfeiture, it is helpful to begin with Md. Ann. Code, Art. 27, section 276 (1982 Repl. Vol. & 1986 Supp.), which sets out the purpose of the comprehensive law and provides guidelines for interpreting and construing that law. After declaring that the illicit drug traffic has "a substantial and detrimental effect on the health and general welfare of the people of the State of

Maryland" and stating the purpose of the law "to prevent [this] abuse which results in a serious health problem to the individual and represents a serious danger to the welfare of the people of the State of Maryland," subsection (b) of that section provides:

"The provisions of this subheading shall be liberally interpreted and construed so as to effectuate its general purpose as stated hereinabove."

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[1] By Ch. 403 of the Acts of 1970, rewriting sections 276-302 of Article 27.

There is no question that forfeiture of real property is a harsh measure. In this case, the harshness is compounded by the fact that Aravanis has owned all or some part of this real property since New Year's Eve of 1971 and has occupied the property for a measure of that time as his residence. Nonetheless, the legislature has determined that "the illegal manufacture, distribution, possession, and administration of controlled substances [has] a substantial and detrimental effect on the health and general welfare of the people of the State of Maryland," Md. Ann. Code, Art. 27, section 276 (1992 Repl. Vol.), and has provided local law enforcement authorities with a forfeiture law as another enforcement tool in their arsenal against the spread of controlled dangerous substances.

The Court of Appeals addressed the deliberate harshness of the forfeiture laws in *Prince George's County v. Blue Bird Cab Company*, 263 Md. 655, 662, 284 A.2d 203, 207 (1971). Judge Diggs, writing for the Court, noted:

We agree that in some ways this is a harsh law; however, it is within the Legislature's power to

> decide whether such a forfeiture provision is desirable. Its purpose is to attempt not only to curtail drug traffic in this state, but to discourage such a blight from continuing in the future. Historically, decisive action has been required to prevent any plague from spreading. In the present case the Legislature has clearly indicated its purpose for this act. It is to control the proliferation of dangerous drugs in our society and it is a noble purpose, but an arduous task. The measures that have been taken are not out of step with the great weight of authority.

Even if this Court were to concur with Aravanis' argument as to harshness of the measure, it has no discretion to allow anything other than forfeiture under the facts of this case.

Upon the execution of the search warrant on Aravanis' property, the seizing authorities found more than two and one half pounds (one kilo) of marijuana, triple beam scales used in the weighing of marijuana, and plastic baggies used in its packaging for resale. Aravanis admitted under oath that he was a dealer of marijuana. The application for the search warrant (State's Exhibit No. 2) indicates that two controlled purchases of marijuana were made from the property within ten days prior to the execution of the search warrant. State's Exhibit No. 3 reflects that Aravanis was convicted of possession of marijuana in sufficient quantity to reasonably indicate under all circumstances an intent to manufacture, distribute, or dispense.

There is no question that the real property at Shelltown Road was used in connection with the distributing and dispensing of marijuana.

Once the above has been established by a preponderance of the evidence, the Court's only responsibilities are to determine if any statutory

exceptions apply (they do not), and whether there has been an adherence to due process (there has been). *State v. One 1967 Ford Mustang*, 266 Md. 275, 278, 292 A.2d 64, 66 (1972). *See State v. Greer*, 263 Md. 692, 284 A.2d 233 (1971). *See also Allen v. State*, 91 Md. App. 775, 786-87, 605 A.2d 994, 1000 (1992) (for discussion on discretion of the court to order forfeiture relative to the civil versus criminal nature of forfeiture proceedings).

Accordingly, after consideration of the evidence and testimony and the applicable law, it is hereby ORDERED this 24th day of August, 1993 by the Circuit Court for Somerset County, Maryland, that the real property of George Joseph Aravanis located on Shelltown Road, Brinkleys Election District of Somerset County, Maryland as more particularly described in a deed dated April 17, 1991 and recorded among the land records of Somerset County, Maryland in Liber ITP No. 396, folio 492, be and it is hereby forfeited to the Somerset County Narcotics Task Force.

/s/

Daniel M. Long
Judge

APPENDIX C

Section 297 of Article 27 of the Maryland Code provides:

Forfeitures and seizures generally; motor vehicles.

(a) *Definitions.* – (1) In this section the following words have the meanings indicated.

(2) "Chief executive officer" means:

(i) For Baltimore City, the Mayor;

(ii) For charter counties, the county executive or, if there is no county executive, the county council;

(iii) For code counties, the county commissioners or county council;

(iv) For county commissioner counties, the county commissioners; and

(v) For municipal corporations, the legislative body established by municipal charter.

(3) "Convicted" means a finding of guilt by a criminal court of competent jurisdiction.

(4) "Final disposition" means the date on which any criminal charge giving rise to a forfeiture under this section is terminated by dismissal, the entry of a nolle prosequi ~~or~~ stet, the entry of a not guilty verdict, the pronouncement of sentence, or the imposition of probation under Article 27, § 292 or § 641 of the Code.

(5)(i) "Forfeiting authority" means the office or person designated, from time to time, by agreement between the State's Attorney for a county and the chief executive officer of the governing body having jurisdiction over the assets subject to forfeiture.

(ii) The Attorney General or the Attorney General's designee when the seizing agency is an instrumentality of the State, may, by agreement with any State's Attorney, or county or municipal attorney,

designate an office or person as forfeiting authority to act on behalf of the State regarding any assets subject to forfeiture by the State.

(6) "Governing body" includes:

(i) The State, if the seizing agency is an instrumentality of the State;

(ii) A county, if the seizing agency is an instrumentality of a county;

(iii) A municipality, if the seizing agency is an instrumentality of a municipality; and

(iv) Baltimore City, if the seizing agency is the Baltimore City Police Department.

(7) "Lien" includes a mortgage, deed of trust, pledge, security interest, encumbrance, or right of setoff.

(8) "Lienholder" means a person who has a lien or a secured interest on property created before the seizure.

(9)(i) "Owner" means a person having a legitimate legal, equitable, or possessory interest in property.

(ii) "Owner" includes:

1. A coowner;

2. A life tenant;

3. A remainderman to a life tenancy in real property;

4. A holder of an inchoate interest in real property; and

5. A bona fide purchaser for value.

(10) "Proceeds" includes property derived directly or indirectly in connection with or as a result of an offense or offenses under this subheading.

(11)(i) "Property" includes:

1. Real property and anything growing on or attached to real property;

2. Tangible and intangible personal property

including securities, negotiable and nonnegotiable instruments, vehicles and conveyances of any type, privileges, interests, claims and rights;

3. Any item, object, tool, substance, device, or weapon used in connection with an enumerated offense; and

4. Money.

(ii) "Property" does not include:

1. Any item unlawfully in the possession of a person other than the owner when used in connection with an offense under this subheading; and

2. A lessor's interest in property subject to a bona fide lease, unless the forfeiting authority can show that the lessor participated in an offense under this subheading or that the property was the proceeds of an offense under this subheading.

(12)(i) "Real property" means any land or improvements to land.

(ii) "Real property" includes:

1. A leasehold or other limited interest in real property;

2. An easement; and

3. A reversionary interest in a 99-year ground lease renewable forever.

(13) "Seizing agency" means any law enforcement authority within the State authorized to investigate violations of this subheading which has seized property under this section.

(b) *Property subject to forfeiture.* – The following shall be subject to forfeiture and no property right shall exist in them:

(1) All controlled dangerous substances which have been manufactured, distributed, dispensed, acquired, or possessed in violation of the provisions of this subheading;

(2) All raw materials, products and equipment

of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled dangerous substance in violation of the provisions of this subheading;

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2) of this subsection;

(4) All conveyances including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) of this subsection, except that:

(i) No conveyance used by any person as a common carrier or vehicle for hire in the transaction of business as a common carrier or vehicle for hire shall be seized or forfeited under this subheading unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to a violation of this subheading; and

(ii) No conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state;

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subheading;

(6) All money, coin, currency, or weapons which have been used or intended for use in connection with the illegal manufacture, distribution, dispensing or possession of controlled dangerous substances or

controlled paraphernalia. All money, coin, currency, or weapons which are found in close proximity to contraband controlled dangerous substances, controlled paraphernalia, or forfeitable records of the importation, manufacture, or distribution of controlled dangerous substances are presumed to be forfeitable under this paragraph. The burden of proof is upon a claimant of the property to rebut this presumption.

This money, currency, or weapons shall be deemed to be contraband of law and all rights, title and interest in and to the money, currency, or weapons shall immediately vest in and to Baltimore City or the county in which it was seized if it was seized by a county or Baltimore City law enforcement agency, including a local sheriff's department which is the law enforcement agency, the municipal corporation, if seized by municipal authorities, or, if it was seized by State law enforcement authorities, the State; and no such money, currency, or weapons shall be returned to any person claiming it, or to any other person, except in the manner hereinafter provided;

(7) All drug paraphernalia as prohibited by § 287A of this article, and controlled paraphernalia as prohibited by § 287 of this article;

(8) The remaining balance of the proceeds of a sale by a holder of an installment sale agreement under § 12-626 of the Commercial Law Article of goods seized by a police department, bureau, or force, under this subtitle;

(9) In the manner provided under subsections (l) and (m) of this section, all real property; and

(10) Everything of value furnished, or intended to be furnished, in exchange for a controlled dangerous substance in violation of this subheading, all proceeds traceable to such an exchange, and all negotiable instruments and securities used, or intended to be used,

to facilitate any violation of this subheading.

(c) *Property not subject to forfeiture.* – Property or an interest in property described under subsection (b)(4),(9), and (10) of this section may not be forfeited if the owner establishes by a preponderance of the evidence that the violation of this subheading was done without the owner's actual knowledge.

(d) *Seizure of property to forfeiture.* – (1) Any property subject to forfeiture under this subheading may be seized upon process issued by any court having jurisdiction over the property except that seizure without such process may be made when:

(i) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(ii) The property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding under this subheading;

(iii) There is probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(iv) There is probable cause to believe that the property has been used or intended to be used in violation of this subheading.

(2) In the event of seizure pursuant to paragraph (1)(iii) and (iv) of this subsection, proceedings under subsection (f) of this section shall be instituted promptly, except all proceedings relating to money or currency, that shall be instituted within 90 days from the date of final disposition of criminal proceedings that arise out of Article 27, §§ 276 through 302, inclusive.

(i) All applications for the forfeiture of money or currency contraband shall be made by the director of finance of Baltimore City, the county treasurer or appropriate county finance officer, municipal treasurer,

or the Attorney General. The applications shall be by complaint, affidavit and show cause order and shall be filed in the District Court or circuit court of the county.

(ii) The complaint, affidavit and show cause order shall be served in the first instance pursuant to Maryland Rule 2-121 or Maryland Rule 3-121(a), and thereafter, the summons having been returned non est, the director of finance of Baltimore City, county treasurer or appropriate county finance officer, municipal treasurer, or Attorney General may proceed pursuant to Maryland Rule 2-122 or Maryland Rule 3-121(b) or (c).

(3)(i) If proceedings relating to money or currency are not instituted by the State or a political subdivision within the 90-day period, the money or currency seized under this section, upon petition by the defendant, shall be returned to the defendant.

(ii) If the defendant fails to petition for return of the money or currency within 1 year from the date of final disposition of criminal proceedings, the money or currency shall revert to the treasury as provided by subsection (f) of this section.

(e) *Seized property not repleviable; sealing or removal of seized property.* – Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the seizing agency subject only to the orders, judgments, and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under the provisions of this subheading, the seizing agency may:

(1) Place the property under seal; and

(2) Remove the property to a place designated by the court.

(f) *Disposition of forfeited property.* – Except as provided under subsection (k) of this section, whenever property is forfeited under this subheading, the political

subdivision in which such property was seized, or, if the property was seized by State authorities, the State may:

(1) Retain the property for official use (except, whenever coin, currency, or property is seized by the Baltimore City police, and forfeited under this subheading, it shall be surrendered to the City of Baltimore for disposition according to this section);

(2) Sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, provided that the proceeds be disposed of for payment of all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising and court costs; or

(3) Require an appropriate agency to take custody of the property and remove it for disposition in accordance with law, or destruction.

(g) *Seizure and summary forfeiture of contraband.* – All substances listed in Schedule I that are possessed, transferred, sold or offered for sale in violation of the provisions of this subheading shall be deemed contraband and seized and summarily forfeited to the State. Similarly, all substances listed in Schedule I, which are seized or come into the possession of the State, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the State.

(1) All species of plants ffom which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this subheading, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the State.

(2) The failure, upon demand by the Department, or its duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being

stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(h) *Procedure; notice.* – (1) Except as provided in § 4-401(8) of the Courts and Judicial Proceedings Article, all proceedings under this section shall be instituted in the circuit court by the appropriate forfeiting authority.

(2)(i) Except as provided under subsection (d)(2) of this section and subparagraph (ii) of this paragraph, a complaint seeking forfeiture shall be filed within the earlier of:

1. 90 days following the seizure; or

2. One year following the final disposition of a criminal charge for a violation under this subheading giving rise to the forfeiture.

(ii) A complaint for the forfeiture of a motor vehicle shall be filed within 45 days after the seizure of the motor vehicle.

(3) A complaint shall contain the following:

(i) A description of the property seized;

(ii) A statement of the time and place where seized;

(iii) The owner, if known;

(iv) The person in possession, if known;

(v) The name of any lienholder, if any, if known or reasonably subject to discovery;

(vi) An allegation that the property is subject to forfeiture;

(vii) If the forfeiting authority is seeking to forfeit a lienholder's interest in property, an allegation that the lien was created with actual knowledge that the property was being, or was to be, used in violation of this subheading;

(viii) A statement of the facts and circumstances surrounding the seizure;

(ix) A statement setting forth the specific causes or grounds for forfeiture or both; and

(x) An oath or affirmation by the forfeiting authority that the contents of the complaint are true to the best of the forfeiting authority's knowledge, information, and belief.

(4) Within 10 days after the filing of the complaint:

(i) Copies of the summons and complaint shall be sent by certified mail requesting "restricted delivery—show to whom, date, address of delivery" and first class mail on all known owners and lienholders whose identities are reasonably subject to discovery, including for real property all owners and lienholders shown in the records prescribed by law for notice or perfection of the lien.

(ii) A notice which includes a description of the property, the date and place of seizure, the known owners and lienholders of the property, the violation or violations of law alleged to be the basis for forfeiture, a statement that a complaint has been filed and that the property shall be forfeited if no answer is timely filed, and instructions on where to file an answer and whom to contact for additional information concerning the forfeiture shall be:

1. Posted by the sheriff at the courthouse door or on a bulletin board within its immediate vicinity;

2. With respect to real property, posted by the sheriff in a conspicuous place on the land; and

3. Published at least once a week in each of 3 successive weeks in 1 or more newspapers of general circulation published in the county in which the action is pending.

(5) The answer shall comply with the Maryland Rules and:

(i) Set forth the nature and extent of the

person's right, title, or interest in the property;

(ii) Set forth the date and circumstances of the creation of the person's right, title, or interest in the property; and

(iii) Contain a request for relief.

(6)(i) The court shall set a hearing on the forfeiture claim within 60 days after the later of the posting or final publication of the notice under paragraph (4) of this subsection if an answer has been timely filed.

(ii) The court may order forfeiture without a hearing of the property interest of any person who fails to timely file an answer.

(i) *Motor vehicles—Standards for seizure.*—In exercising the authority to seize motor vehicles pursuant to this section the following standards shall be utilized:

(1) A motor vehicle used in violation of this section shall be seized and forfeiture recommended to the forfeiting authority when:

(i) Controlled dangerous substances in any quantity are sold or attempted to be sold in violation of this subtitle;

(ii) Although the violator has not sold or attempted to sell controlled dangerous substances in violation of this subtitle, an amount of such substances or paraphernalia is located which would reasonably indicate that sale is contemplated by the violator; or

(iii) The total circumstances of the case dictate that seizure and forfeiture is justified; these circumstances would include such factors as the following:

1. The possession of controlled dangerous substances;

2. An extensive criminal record of the violator;

3. A previous conviction of the violator for a controlled dangerous substances violation;

4. Corroborated information is developed indicating that the violator is or was recently a seller, or frequently associates with individuals known to be distributors of illegal controlled dangerous substances or paraphernalia;

5. Circumstances of the arrest; or

6. The manner in which the vehicle was being used.

(2) A motor vehicle used in violation of this subtitle shall not be seized and forfeiture shall not be recommended to the forfeiting authority when:

(i) The motor vehicle is being used by a member of the family other than the registered owner and controlled dangerous substances or paraphernalia are located therein in a quantity insufficient to suggest a sale is contemplated, and where no sale was made or attempted, and the registered owner did not know that such material was in the motor vehicle;

(ii) An innocent registered owner lends his motor vehicle to another and the latter or someone invited into the motor vehicle by such person causes controlled dangerous substances or paraphernalia to be brought into the vehicle without the knowledge of the owner; or

(iii) The motor vehicle falls within the provisions of subsection (b)(4)(i) or (ii) of this section.

(3) Forfeiture of the motor vehicle used in violation of this subtitle shall be recommended to the forfeiting authority only after the chief law enforcement officer of the police department, bureau, or force that seized the motor vehicle has determined from the records of the Motor Vehicle Administration the names and addresses of all registered owners and secured parties as defined in the Code, has personally reviewed the facts and circumstances of the seizure and has personally determined, according to the above

guidelines, that forfeiture is warranted and so represents in writing to the appropriate forfeiting authority.

(j) *Same—Surrender of vehicle to owner.*—If the forfeiting authority determines independent of the decision of the police department, bureau, or force that seized the motor vehicle that the motor vehicle falls within the purview of subsection (i)(2) of this section or that the standards to be utilized pursuant to subsection (i)(1) of this section were not met, the forfeiting authority shall surrender the vehicle upon request to the owner.

(k) *Posthearing orders.*—(1) If, after a full hearing, the court determines that the property should not be forfeited, the court shall order that the property be released.

(2)(i) If the court determines that the property should be forfeited, the court shall order that the property be forfeited to the appropriate governing body.

(ii) If, however, the court determines that the forfeited property is subject to a valid lien created without actual knowledge that the property was being, or was to be, used in violation of this subheading, the court shall order that the property be released within 5 days to the first priority lienholder.

(iii) The lienholder shall sell the property in a commercially reasonable manner.

(iv) The proceeds of the sale shall be applied as follows:

1. To the court costs of the forfeiture proceeding;

2. To the balance due the lienholder including all reasonable costs incident to the sale;

3. To payment of all other expenses of the proceedings for forfeiture, including expenses of seizure, or maintenance of custody; and

4. To the general funds of the State or the

political subdivision that seized the property.

(l) *Presumption of ownership of property.* – (1) Except as provided in paragraph (2) of this subsection, when the State establishes by clear and convincing evidence that a person has committed a violation of Article 27, § 286, § 286A, § 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses, there is a rebuttable presumption that any property or any portion thereof in which that person has an ownership interest is subject to forfeiture as proceeds if the State establishes by clear and convincing evidence that:

(i) The property was acquired by such person during the period in which such person had committed violations of Article 27, § 286, § 286A, § 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses, or within a reasonable time after such period; and

(ii) There was no likely source for such property other than the violation of Article 27, § 286, § 286A, § 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses.

(2) Except as provided in subsection (n)(2) of this section, real property used as the principal family residence may not be forfeited under this subsection unless it is shown that one of the owners of the real property was convicted of one or more of the offenses described under paragraph (1) of this subsection.

(3) The burden of proof is on a claimant of the property to rebut the presumption in paragraph (1) of this subsection.

(m) *Forfeiture of interest in real property.* – (1)(i) Except as provided in subsection (l) of this section and paragraph (2) of this subsection, an owner's interest in real property may be forfeited if the real property was used in connection with a violation of Article 27, § 286,

§ 286A, § 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses.

(ii) An owner's interest in real property may not be forfeited for a violation of Article 27, § 287 or § 287A of the Code.

(2) Except as provided in subsections (l) (2) and (n)(2) of this section, real property used as the principal family residence by a husband and wife and held by the husband and wife as tenants by the entirety, and which was used in connection with a violation of Article 27, § 286, § 286A, § 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses, may not be forfeited unless both the husband and wife are convicted of one or more of these offenses.

(3)(i) Forfeiture proceedings for real property may be brought in the jurisdiction where:

1. The criminal charges are pending;
2. The owner resides; or
3. The real property is located.

(ii) 1. If forfeiture proceedings for real property are brought in a jurisdiction other than where the real property is located lis pendens shall be filed in the jurisdiction where the property is located.

2. A lis pendens required under this subparagraph shall include at a minimum:

A. The name and address of the owner of the property;

B. A description of the property; and

C. A description of the reasons for the filing of the forfeiture proceedings and the lis pendens.

(4) Seizure of real property occurs when a complaint for forfeiture under this subtitle is filed or lis pendens is filed in the circuit court of the jurisdiction where the property is located, whichever occurs first.

(5) Unless agreed to by the forfeiting authority or ordered by the court, or unless the owner posts a

bond under subsection (o) of this section, an owner may not attempt to convey or encumber an interest in seized real property, or remove a building or fixture on seized property until the court enters judgment in favor of the owner.

(n) *Same—Stay or forfeiture pending appeal.*—(1) If an owner of real property used as the principal family residence is convicted of a violation under Article 27, § 286, § 286A, § 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses, and the owner files an appeal of the conviction, the court shall stay, during the pendency of the appeal, any forfeiture proceedings under subsection (l)(2) or subsection (m)(2) of this section against real property used as the principal family residence.

(2) A court may order a forfeiture of real property used as the principal family residence under subsection (l)(2) or subsection (m)(2) of this section without a conviction if the owner:

(i) Fails to appear for a required court appearance; and

(ii) Does not surrender to the jurisdiction of the court within 180 days of the date of the required court appearance.

(o) *Obtaining possession of seized property by owner.*—(1) Except as provided in subsection (m)(4) and (p) of this section, if an owner of seized property wants to obtain possession of the property, regardless of whether forfeiture proceedings have been commenced, or to convey an interest in real property, or remove a building or fixture on real property, where forfeiture proceedings have been commenced against the real property, the owner shall notify:

(i) If forfeiture proceedings have been commenced, the clerk of the court where the proceedings have been commenced;

(ii) If criminal proceedings have been commenced but forfeiture proceedings have not, the clerk of the court where the criminal proceedings have been commenced; or (iii) If neither forfeiture nor criminal proceedings have been commenced, the clerk of the circuit court of the jurisdiction where the property was seized.

(2) If the property is not needed for evidentiary purposes in a judicial proceeding:

(i) For property other than motor vehicles, the clerk shall obtain an independent appraisal of the value of the property.

(ii) For motor vehicles, the clerk shall have an appraisal made by the sheriff of the jurisdiction in which the court is located.

(3) The sheriff or other person responsible for an appraisal under paragraph (2) of this subsection shall promptly:

(i) Inspect and render an appraisal of the value of the property; and

(ii) Return the appraisal, in writing, under oath, to the clerk of the court.

(4) Notice of the appraisal shall be sent to all lienholders shown in the records prescribed by law for notice or the perfection of the lien.

(5)(i) Upon the filing of the appraisal, the owner may give bond payable to the clerk of the court in an amount equal to the greater of the appraised value of the property plus costs which may accrue, or the aggregate amount of the liens on the property as shown in the records prescribed by law for the notice or perfection of liens, with security to be approved by the clerk of the court, and conditioned for performance on final judgment by the court.

(ii) The bond authorized in this subsection shall be filed in the District Court or circuit court where the

criminal action that gave rise to the seizure is pending and shall be part of that same criminal proceeding, unless a complaint for forfeiture has been filed. However, if no criminal action is pending or if no forfeiture complaint has been filed, the bond shall be filed in the circuit court or District Court where the property was seized.

(6)(i) If forfeiture of the property or of an interest or equity in the property or proceeds is directed under this section, judgment shall be entered against the obligors on the bond without further proceedings, to be discharged by payment of the amount of the bond, on which judgment may issue.

(ii) Payment of the amount of the bond shall be applied as provided under subsection (k)(2)(iv) of this section.

(p) *Possession of seized real property by tenants.* – (1) Subject to the rights of a lienholder to sell the real property, an owner or the owner's tenants may remain in possession of seized real property until forfeiture is ordered.

(2) The forfeiting authority may apply to the court for the appointment of a receiver to apply income from income-producing property.

(3) If an owner or the owner's tenants remain in possession of the real property and that owner's or tenant's interest in the real property is forfeited, that owner or tenant shall immediately surrender the property to the seizing agency in substantially the same condition as when seized.

(q) *Terms of sale.* – Any sale ordered pursuant to this section shall be made for cash and vest in the purchaser a clear and absolute title to the property that is sold.

(r) *Rights of lienholder.* – (1) This section may not be construed to prohibit a lienholder from exercising

its rights under applicable law, including the right to sell property that has been seized under this section, in the event of a default in the obligation giving rise to the lien.

(2)(i) A lienholder exercising the right to sell property that has been seized under this section shall notify the forfeiting authority in writing of the lienholder's intention to sell the property.

(ii) The notice shall be accompanied by copies of documents giving rise to the lien and shall include an affidavit under oath by the lienholder that the underlying obligation is in default and the reasons for the default.

(iii) Upon request of the lienholder, the property (s)shall be released to the lienholder.

(3) Except as provided in paragraph (4) of this subsection, the rights and duties provided by law to the lienholder for the sale of collateral securing an obligation in default shall govern the repossession and sale of the property.

(4)(i) The lienholder may not be required to take possession of the property prior to the sale of the property.

(ii) The proceeds of the sale shall be applied first to the costs of the forfeiture proceeding, then as provided by law for distribution of proceeds of a sale by the lienholder.

(iii) Any portion of the proceeds that would be paid to an owner of the property under the applicable law relating to distribution of proceeds shall be paid to the seizing agency and shall be property subject to forfeiture. If no order of forfeiture is entered, the State shall remit to the owner that portion of the proceeds and any costs of the forfeiture proceedings paid from the proceeds of the sale.

(5)(i) If the interest of the owner in the property

is redeemed, the lienholder shall mail a notice of the redemption to the forfeiting authority within 10 days after the redemption.

(ii) If the property has been repossessed or otherwise lawfully taken by the lienholder, the lienholder shall return the property to the seizing agency within 21 days after the redemption.

(iii) The seizing agency and the forfeiting authority may then proceed with the forfeiture of the property or proceeds, and all time limitations required under this section for notice and filing of the complaint for forfeiture shall run from the date of the redemption or purchase of the property.

(s) *Powers of court.* – In a proceeding under this section, a court may:

(1) Grant requests for mitigation or remission of forfeiture, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) Resolve claims arising under this section; or

(3) Take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

Supreme Court, U.S.
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No. 95-902

In The

Supreme Court of the United States

October Term, 1995

SOMERSET COUNTY, MARYLAND,

Petitioner,

vs.

GEORGE JOSEPH ARAVANIS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals of Maryland's ruling solely under the excessive fines provision of Article 25 of Maryland's Declaration of Rights is based on independent and adequate state grounds?

2. Did the Court of Appeals adopt the proper test to determine whether the civil forfeiture of respondent's real property violates the excessive fines provision of Article 25 of Maryland's Declaration of Rights?

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Respondent George Joseph Aravanis respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the opinion of the Court of Appeals of Maryland, issued on September 13, 1995. The decision is reported as *Aravanis v. Somerset County*, 339 Md. 644, 664 A.2d 888 (1995), and is reprinted in the Appendix to the Petition for a Writ of Certiorari at Appendix A.

STATEMENT OF THE CASE

On January 24, 1992, the Somerset County Narcotics Task Force ("Somerset County"), acting through the State's Attorney for Somerset County ("State"), brought a civil forfeiture action against respondent George Joseph Aravanis seeking the forfeiture of Aravanis' home and farm pursuant to Maryland's drug forfeiture statute, Md. Ann. Code art. 27 § 297 (Michie 1992). (App. 30a). The forfeiture action was commenced one day after Aravanis had been convicted, on January 23, 1992, of a charge of possession of a controlled dangerous substance (marijuana) in sufficient quantity to indicate an intent to distribute. (App. 31a).

A civil trial was held before Judge Daniel Long of the Circuit Court for Somerset County, Maryland on January 4, 1993, with Aravanis representing himself. Aravanis' house and farm were forfeited to the Somerset County Narcotics Task Force, the same entity that had initiated the criminal investigation of Aravanis, by an Order of the Court dated August 24, 1993. (App. 39a). In that Order, Judge Long stated that "[t]here is no question that forfeiture of real property is a harsh measure. In this case, the harshness is compounded by the fact that Aravanis has owned all or some part of this real property since New Year's Eve of 1971 and has occupied the property for a measure of that time as his residence." (App. 37a). The court concluded that "[e]ven if this Court were to concur with Aravanis' argument as to the harshness of the measure, it has no discretion to allow anything other than forfeiture." (App. 38a).

As the trial court pointed out, Aravanis and his wife, Margaret, had acquired joint title in the property nearly twenty years before his arrest and had occupied the house and property as a residence and farm while raising nine children. (App. 2a, 31a). In 1988 Aravanis and his wife were divorced, and on April 17, 1991, Aravanis obtained sole possession of the real property pursuant to a divorce settlement agreement. (App. 31a).

Shortly after April 17, 1991, Aravanis used a portion of the divorce proceeds to purchase marijuana for resale and began selling small amounts of marijuana. (App. 34a n.3). Aravanis had never distributed drugs prior to April 17, 1991, and no evidence of any prior arrests or convictions was presented at the forfeiture trial. (App. 34a). Somerset County erroneously states that Aravanis had been selling drugs out of his home for many years prior to the divorce, and that Aravanis sold other drugs besides marijuana. (Petition at 2 n. 1, 3). Those same unsupported allegations were presented to the trial court, but the trial court made no specific findings concerning the allegations and simply noted that the evidence showed that "two controlled purchases of marijuana were made by the State from Aravanis' property within a short period of time prior to execution of the search warrant." (App. 34a).

Aravanis, now represented by counsel, appealed the forfeiture decision of the Circuit Court of Somerset County to the Court of Special Appeals of Maryland, but the Court of Appeals of Maryland granted certiorari on its own motion before the intermediate appellate court could hear the case. (App. 8a). On September 13, 1995, the Court of Appeals of Maryland issued an Opinion reversing the decision of the trial court and holding that the trial court had failed to consider whether the forfeiture of Aravanis' real property was "excessive" under the excessive fines provision of Article 25 of the Maryland Declaration of Rights. (App. 2a).

The Court of Appeals also set forth a test for trial courts in

Maryland to use in determining whether a forfeiture of real property under the state civil forfeiture statute is "excessive" and therefore violative of Article 25. (App. 2a, 27a-28a). The court unanimously held that Maryland's excessive fines provision "requires more" than a simple examination of the relationship between the property and the underlying criminal offense. (App. 26a). Rather, the trial court must "compare the gravity of the offense or offenses involving the property and the extent of involvement of the owner with the enormity of the loss to the owner occasioned by the forfeiture." (App. 26a-27a). The court remanded the case to the trial court for a new trial in light of the fact that no evidence had been presented at trial "concerning the value of either the subject property or of the marijuana seized or as to any other factor bearing on the fairness of the forfeiture." (App. 8a).

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS OF MARYLAND BASED ITS DECISION ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has stated that it will not review a state court decision which indicates that it is based on independent and adequate state grounds, *Michigan v. Long*, 463 U.S. 1032 (1983), because "the views of the State's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). This Court has further pointed out that it is especially important that state courts, such as the Court of Appeals of Maryland, should be left free and unfettered in interpreting their state constitutions. *Michigan*, 463 U.S. at 1041 (*quoting Minnesota v. National Tea Co.*, 309 U.S. 551 (1940)). To preserve our federalist system of government, state courts should be afforded the

last word in legal interpretation until it is absolutely necessary for this Court to intervene in the decision-making process. *Id.* at 1067 (Stevens, J. dissenting).

It is plain that the Court of Appeals of Maryland's decision in *Aravanis v. Somerset County,* 664 A.2d 888 (Md. 1995), rests on independent and adequate state grounds, because the Court of Appeals expressly stated that it would decide *Aravanis* under Article 25, not under the Eighth Amendment. (App. 14a). In *Aravanis,* the Court of Appeals held, solely as a matter of state law, that trial courts must apply a multi-factor "proportionality" test to determine whether a forfeiture under Maryland's civil forfeiture statute is an excessive fine under Article 25 of the Maryland Declaration of Rights. The Court of Appeals explained that it need not (and therefore would not) decide *Aravanis* under the Eighth Amendment's Excessive Fines Clause, because this Court has never determined whether the Excessive Fines Clause of the Eighth Amendment applies to the several states. (App. 14a).

This is not a case, such as *Michigan v. Long,* where the state court based its ruling on both the state constitution *and* the federal constitution. *Michigan,* 463 U.S. at 1037 n. 3. In that case, the state court only mentioned the state constitution twice in the entire opinion — once in a footnote and once again in the concluding sentence of the opinion, where the court stated: "We [the Michigan Supreme Court] hold, therefore, that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution." *Id.* Because the independence of any possible state law ground was not clear from the state court's opinion, this Court found "jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground." *Id.* at 1044.

In this instance, however, the Court of Appeals provided a

"plain statement" indicating that it was basing its decision solely on the excessive fines provision of Article 25 of the state constitution. (App. 14a). In other words, the Court of Appeals made clear "in its judgment or opinion that the federal cases are being used only for purposes of guidance, and do not themselves compel the result that the court has reached." *Id.* at 1041. The Court of Appeals' interpretation of Article 25's excessive fines provision and development of an excessive fines test by reference to federal precedents do not undermine the conclusion that the *Aravanis* decision rests on independent and adequate state grounds, for two reasons.

First, prior to *Aravanis*, there were few Maryland state court opinions analyzing and/or interpreting Article 25's excessive fines provision. Therefore, it is not surprising to find that the Court of Appeals used federal case law to analyze the excessive fines provision of the state constitution, especially in light of the fact that Article 25, like many constitutional provisions in many state constitutions, is textually identical to its counterpart in the federal constitution. (App. 15a-16a). In such instances, state courts resolving state constitutional issues will often be guided by analogous federal precedents, especially where the state court has not previously analyzed the particular constitutional provision. For purposes of review by this Court, however, the critical issue is whether the state court viewed the federal case law as dispositive of the state consitutional issue. Here, the Court of Appeals clearly did not and, indeed, could not without reaching the very question that it explicitly avoided: whether the Excessive Fines Provision of the Eighth Amendment is binding on the States. *See* Point II, *supra.*

Second, although Somerset County is correct that the Court of Appeals' discussion of the excessive fines provision in *Aravanis* relied heavily on analysis and interpretations of federal case law, it is important to note that the Court of Appeals, unlike the state court in *Michigan v. Long,* did not rely solely on federal case law in

fashioning an excessive fines test under Article 25, but rather also examined decisions from other states which interpreted different state civil forfeiture provisions under different state constitutions. (App. 18a). For instance, the Court of Appeals examined how the Pennsylvania Supreme Court, the Appellate Court of Illinois, the Supreme Court of Idaho and the Court of Appeals of Texas interpreted their own state constitutions in light of this Court's statements in *Austin v. United States*, 113 S. Ct. 2801 (1993). (App. 18a-21a).

In light of the lack of prior state law decisions concerning the excessive fines provision of Article 25, the Court of Appeals' references to other state court decisions, and the Court of Appeals' express decision not to decide *Aravanis* under the Eighth Amendment, it is clear that *Aravanis* was decided on independent and adequate state grounds that preclude appellate review by this Court.

II.

THIS COURT SHOULD NOT DECIDE AN ISSUE THAT WAS PURPOSELY AVOIDED BY THE COURT OF APPEALS OF MARYLAND — WHETHER THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT APPLIES TO THE STATES.

The crux of Somerset County's argument is that the Court of Appeals misinterpreted the Excessive Fines Clause of the Eighth Amendment by formulating an excessive fines test that is contrary to the test adopted by several federal circuit courts, including the Fourth Circuit. Somerset County refuses to recognize, however, that the Court of Appeals expressly chose to avoid the Eighth Amendment and based its ruling on Article 25 because the issue of whether the Excessive Fines Clause of the Eighth Amendment applies to the States has never been decided by this Court. (App. 14a n. 10).

If the Court of Appeals of Maryland had chosen to base its decision on the Eighth Amendment, it would have been required to decide the issue of whether the Excessive Fines Clause applies to the States. The Court of Appeals' failure to adjudicate the incorporation issue is compelling evidence that the decision by the Court of Appeals was not premised in any manner on the Eighth Amendment and is also a strong reason why this Court should not review the *Aravanis* case. If this Court were to grant certiorari and address the question presented by Somerset County, then it would be required to determine whether the Excessive Fines Clause of the Eighth Amendment applies to the States. Otherwise, this Court would be acting in the role of advisor to the Court of Appeals of Maryland — a role it has repeatedly stated is not permitted. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1984) (*citing Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)).

Aravanis believes that the Excessive Fines Clause of the Eighth Amendment applies to the several states, but there is no reason for this Court to address that issue because it was purposely avoided by the Court of Appeals in *Aravanis*. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Prot. Ass'n.*, 485 U.S. 439, 445 (1988). In the past the Court has "relied on that principle to resolve doubts about the independence of state-law decisions in favor of an interpretation that avoids a constitutional question." *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 158 (1984). *See also Black v. Cutter Laboratories*, 351 U.S. 292, 299-300 (1956) ("[E]ven if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question.").

CONCLUSION

For the foregoing reasons, Respondent George Joseph Aravanis respectfully requests that this Court deny the Petition for a Writ of Certiorari.

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No. 95-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SOMERSET COUNTY, MARYLAND,
Petitioner,

v.

GEORGE JOSEPH ARAVANIS,
Respondent.

On Petition For a Writ of Certiorari To The Court of Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1995

No. 95-902

SOMERSET COUNTY, MARYLAND,
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Respondent.

On Petition For a Writ of Certiorari
To The Court of Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

REPLY ARGUMENT

Without so much as a mention of the merits of the civil forfeiture excessive fines issue presented to this Court, respondent devotes his entire brief in opposition to the questions whether an independent state law ground supports the judgment below and whether this Court should take this case to decide the applicability *vel non* of the Excessive Fines Clause to the several States. Respondent's resounding silence on the question presented by the petition can only be taken as a tacit

concession that the issue is, indeed, worthy of this Court's review. The independent state ground issue is easily resolved by consulting this Court's decision last year in *Arizona v. Evans*, 115 S. Ct. 1185 (1995), which respondent inexplicably overlooks. The question of the applicability of the Excessive Fines Clause to the States, on which petitioner and respondent are in absolute agreement, provides yet another reason to grant, not deny, review.

I.

THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND.

Ignoring the plain language of the opinion below, respondent first argues that the Court of Appeals of Maryland's decision rests on an adequate and independent state law ground. Respondent initially asserts that state courts should be left free to interpret their state constitutions. (Brief in Opp. at 3). Respondent next contends that the court below based its decision on a state, not federal, provision and made clear that the federal cases it looked to were used only for guidance and did not compel the result the court reached. (*Id.* at 4-5). Although the state court certainly was free to interpret Maryland's Declaration of Rights provision governing excessive fines to extend greater rights than its federal counterpart, it is absolutely clear that the court did not do so. Consistent with its practice over the past century, the

state supreme court followed federal law because it felt compelled to do so. Rather than look to federal cases simply for guidance, it looked to such cases as binding precedent. Thus, the decision of the Maryland high court does not rest upon an adequate and independent state law ground.

This Court's pronouncement last year in *Arizona v. Evans* provides the framework for analysis of jurisdictional claims such as the one made by respondent. In that case, the Court adhered to the standard adopted in *Michigan v. Long*, 463 U.S. 1032 (1983):

> When "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

115 S. Ct. at 1189, *quoting Long*, 463 U.S. at 1040-41. Even a cursory reading of the opinion of the court below shows that the decision is based on federal law, is interwoven with it, and is controlled by it. Even more plain is the conclusion that the Maryland state court decided the case the way it did because of its interpretation of the Eighth Amendment's Excessive Fines Clause.[1]

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[1] In resolving this issue, the Court need only ask itself "whether the same judgment would be rendered by the state court after the Court has corrected any error in its view of

(continued...)

To be sure, the Court of Appeals began its discussion of the excessive fines issue by reference to the state counterpart to the Eighth Amendment, Article 25 of the Maryland Declaration of Rights. (Pet. for Cert. App. 14a). The court immediately went on to state, however, that the state and federal provisions are "textually and historically, substantially identical," (*id.* 14a-16a), noting that both were taken virtually verbatim from the English Bill of Rights of 1689, (*id.* 16a). After pointing out that the excessive fines provision of the Maryland Declaration of Rights served as a model for its counterpart in the Eighth Amendment, the court concluded: "Thus, the excessive fines provision of Article 25 should be interpreted co-extensively with the excessive fines provision of the Eighth Amendment." (*Id.*).

If this were not a plain enough statement that Article 25 provides no greater protections than does the Eighth Amendment and that federal law controlled the outcome of the case, the court went on to discuss this Court's decision in *Austin v. United States*, 113 S. Ct. 2801 (1993), as well as the numerous federal and state court cases decided in *Austin's* wake. (Pet. for Cert. App. 16a-26a). All of these cases, of course, apply the federal law of the Eighth Amendment. The Maryland court concluded its discussion of the law with a most telling declaration:

> The requirements of the Excessive Fines Clause

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[1](...continued)
federal law." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 3.24, at 152 (7th ed. 1993). Because the same judgment would not have been rendered in this case absent the state court's erroneous construction of the Eighth Amendment, the decision did not rest on an adequate state law ground.

> of the Eighth Amendment and, ***hence***, of Article 25 of the Maryland Declaration of Rights, mandate that recognition and effect be given to the use of the word "excessive" in that clause and to the *Austin* court's holding that a civil forfeiture is punishment.

(Pet. for Cert. App. 26a) (emphasis added). There could be no plainer statement that the Maryland court felt compelled to reach its decision as a matter of federal constitutional law and was not merely looking to federal decisions for purposes of guidance.

That the court in this case construed a provision of Maryland's Declaration of Rights co-extensively with a federal counterpart is nothing new in this State. Indeed, the Maryland courts have long done so in an unbroken line of cases. Typical of the Court of Appeals of Maryland's statements is the following: "We have consistently considered guarantees in the Declaration of Rights to be in *pari materia* with similar provisions of the federal constitution. Thus, we apply the same standards whether the claim alleges violation of a state or federal constitutional right." *Ogrinz v. James*, 309 Md. 381, 395 n.3, 524 A.2d 77, 84 n.3 (1987). Judge Charles E. Moylan, Jr. has echoed this sentiment for the Court of Special Appeals of Maryland: "As a practical matter, [provisions of the Maryland Declaration of Rights] are never used. Substantively, moreover, they are redundantly coterminous with their federal counterparts." *Hof v. State*, 97 Md. App. 242, 250, 629 A.2d 1251, 1255 (1993), *aff'd*, 337 Md. 581, 655 A.2d 370 (1995).

Cases dating back to 1883 express the same sentiment. *See, e.g., Lanasa v. State*, 109 Md. 602, 611-12, 71 A. 1058, 1062 (1909); *Blum v. State*, 94 Md. 375, 382, 51 A.

26, 29 (1902); *Baltimore Belt R.R. Co. v. Baltzell*, 75 Md. 94, 98-99, 23 A. 74 (1891); *Foote v. State*, 59 Md. 264, 268 (1883). Over the years, the courts of Maryland have ruled that numerous rights contained in the Declaration of Rights and the federal constitution are coterminous and are to be construed *in pari materia*. For example, the Fourth Amendment protection against unreasonable searches and seizures and the comparable right contained in Article 26 of the Declaration of Rights are identical. *See, e.g., Livingston v. State*, 317 Md. 408, 410, 564 A.2d 414, 415-16 (1989); *Trusty v. State*, 308 Md. 658, 661 n.1, 521 A.2d 749, 750 n.1 (1987); *State v. Smith*, 305 Md. 489, 513 n.9, 505 A.2d 511, 523 n.9, *cert. denied*, 476 U.S. 1186 (1986). The privilege against self-incrimination found in the Fifth Amendment and Article 22 are the same. *See, e.g., Hof v. State*, 337 Md. 581, 586 n. 3, 655 A.2d 370, 373 n. 3 (1985); *Adkins v. State*, 316 Md. 1, 7 n.5, 557 A.2d 203, 206 n.5 (1989); *In re Maurice M.*, 314 Md. 391, 393, 550 A.2d 1135, 1136 (1988), *rev'd on other grounds sub nom. Baltimore City Dep't of Social Services v. Bouknight*, 493 U.S. 549 (1990). And the right to be free from cruel or unusual punishments guaranteed by both the Eighth Amendment and Article 25 are coterminous. *See, e.g., Thomas v. State*, 333 Md. 84, 102 n.5, 634 A.2d 1, 10 n.5 (1993); *Minor v. State*, 313 Md. 573, 589 n. 4, 546 A.2d 1028, 1035 n.4 (1988) (concurring opinion); *Harris v. State*, 312 Md. 225, 237 n.5, 539 A.2d 637, 642 n.5 (1988). *See also Craig v. State*, 322 Md. 418, 430, 588 A.2d 328, 334 (1991), *on remand from Maryland v. Craig*, 497 U.S. 836 (1990) (right to confrontation in Sixth Amendment and Article

21 *in pari materia*); *Maryland Dep't of Human Resources v. Bo Peep Day Nursery*, 317 Md. 573, 601 n.7, 565 A.2d 1015, 1029 n.7 (1989) (right to due process in Fourteenth Amendment and Article 24), *cert. denied*, 494 U.S. 1067 (1990); *Parren v. State*, 309 Md. 260, 263, 523 A.2d 597, 598 (1987) (right to counsel in Sixth Amendment and Article 21); *WBAL-TV Div., Hearst Corp. v. State*, 300 Md. 233, 243 n.4, 477 A.2d 776, 781 n.4 (1984) (right to free speech in First Amendment and Article 40); *Montgomery County v. Schooley*, 97 Md. App. 107, 114, 627 A.2d 69, 73 (1993) (rights of legislators in Speech or Debate Clause of Article I, § 6 and Article 10).

In sum, given the long history in Maryland of construing analogous state and federal rights to be identical, together with the language expressly so stating in the present case, there can be no doubt that federal law compelled the result here. The decision is therefore not insulated from this Court's review merely because the court eschewed exclusive reliance on the Eighth Amendment in deciding the case. Were it otherwise, a state court could evade review of this or any federal question simply by mentioning the counterpart state right, notwithstanding that the state right is totally controlled by reference to federal law.

II.

THIS COURT CAN AND SHOULD DECIDE WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO THE STATES.

Respondent secondarily contends that this case should not be reviewed by this Court because the question whether the Excessive Fines Clause applies to the States was not decided by the court below and has never been addressed by this Court. (Brief in Opp. at 6). If anything, that is all the more reason for this Court to grant review in the present case.

Respondent states that he believes the Excessive Fines Clause applies to the States. (*Id.* at 7). Petitioner agrees, particularly given that the Cruel and Unusual Punishment Clause has been incorporated through the Fourteenth Amendment. *See Browning-Ferris Industries v. Kelco Disposal Inc.*, 492 U.S. 257, 284 (1989) (O'Connor, J., concurring in part and dissenting in part) (would hold that the Excessive Fines Clause applies to the States). This issue was before the court below[2] and was discussed at some length in the court's opinion. (Pet. for Cert. App. 14a-16a). As such, it can be decided by this Court because it necessarily is encompassed within the question presented by the petition for writ of certiorari. *See Yee v. City of*

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[2] The first question presented in the brief filed by respondent in the state appellate court read as follows: "Is the Excessive Fines Clause of the Eighth Amendment of the United States Constitution binding on the several States?"

Escondido, 503 U.S. 519, 535 (1992) ("statement of any question presented will be deemed to comprise every subsidiary question fairly included therein"); Sup. Ct. R. 14.1(a).

CONCLUSION

For the foregoing reasons and for the reasons stated in its petition for writ of certiorari, Somerset County, Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland in this case.

Respectfully submitted,

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